90-259

No. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM LOWARY, *et al.*,
Petitioners,

v.

LEXINGTON TEACHERS ASSOCIATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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August 9, 1990

QUESTIONS PRESENTED

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 309 (1986), this Court held that unions seeking to collect agency fees are required to establish *pre-collection* procedures to safeguard the right of nonunion employees to refrain from supporting the political, ideological and other non-collective bargaining causes of the union, "because the agency shop itself impinges upon the nonunion employees' First Amendment interests."

The questions presented are:

1) Where three successive agency fee collection procedures were struck down by the federal courts as unconstitutional, and no procedure has yet been approved, does First Amendment due process permit the unions to keep *any* of the fees that were seized from nonmembers under those unlawful collection plans?

2) If complete restitution of all illegally seized fees is not required, may the district court, in an action brought under 42 U.S.C. § 1983, delegate to the unions' internal "arbitration" system its judicial function of calculating the percentage of fees that is allocable to constitutionally nonchargeable union expenses and, therefore, refundable as damages?

LIST OF PARTIES TO THE PROCEEDINGS

The plaintiffs in this case were William Lowary and Sara Wyatt. Both of these plaintiffs join in the instant Petition.

The defendants below were the Lexington Teachers Association, the Ohio Education Association, the Lexington Local Board of Education, and individual members of the Lexington Local Board of Education (Robert Whitney, Mark Plotnick, Susan Umbarger, James Bollinger, Rick Bell and Helen Gilroy). The district court dismissed the suit against the individual defendants, and no appeal was taken. Thus, the respondents are the Lexington Teachers Association, the Ohio Education Association and the Lexington Local Board of Education.

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Petitioners William Lowary and Sara Wyatt respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on May 17, 1990.

OPINIONS BELOW

The opinion of the court of appeals is reported at 903 F.2d 422, and is reproduced *infra* at 1a as Appendix A. An earlier opinion of the court of appeals, on an appeal from the denial of preliminary injunctive relief, is reported at 854 F.2d 131, and is reproduced *infra* at 22a as Appendix B. The opinions of the United States District Court for the Northern District of Ohio are reported at 124 L.R.R.M. (BNA) 2516, 704 F. Supp. 1430, 704 F. Supp. 1456, and 704 F. Supp. 1476, and are reproduced

infra at 29a, 38a, 90a and 127a as Appendices C, D, E and F respectively.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1990. This Petition is filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution says in pertinent part: "Congress shall make no law * * * abridging the freedom of speech * * * or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Section 1 of the Fourteenth Amendment provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." The Civil Rights Act of 1871, 42 U.S.C. § 1983, states in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State * * *, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Ohio statute which permits the negotiation of agreements requiring nonunion public employees to pay a compulsory fee to a union, Ohio Revised Code § 4117.09(C), is reproduced in relevant part *infra* at 136a as Appendix G.

STATEMENT OF THE CASE

This civil rights action, brought under 42 U.S.C. § 1983, was initiated by two nonunion school teachers ("teachers") in the United States District Court for the Northern District of Ohio, on April 28, 1986.[1] The teachers are employed by the Lexington Local Board of Education ("school board"), which had entered into an "agency shop" contract with the teachers' exclusive bargaining representative, the Lexington Teachers Association and its affiliates.[2] The teachers alleged that the school board and the unions were collecting agency fees in violation of the principles enunciated in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986).

Over the course of this litigation, the unions have established three successive rebate plans, all of which purported to comply with *Hudson*. The lower courts ultimately ruled that all three of these plans had defects that rendered them unconstitutional.

Under the first union rebate plan (covering the 1985-86 academic year), the school board deducted an "agency fee" *equal* to the dues paid by voluntary union members from the salary of each nonunion employee. No financial disclosure was given to

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[1] Jurisdiction in the district court was based upon 28 U.S.C. §§ 1331 and 1343. *See* Complaint, ¶ 5.

[2] Respondent unions are part of a four-level unified nationwide union hierarchy. At the top of the hierarchy is the National Education Association ("NEA"), a nationwide labor union. Below the NEA is the OEA, its state-wide affiliate. Below the OEA are "district education associations," such as the North Central Ohio Education Association ("NCOEA"), and on the bottom are "local education associations," such as the Lexington Teachers Association. Only the "local education association" is the exclusive bargaining representative of the teachers. However, the "local education association" relies upon its principal, OEA, to maintain a plan which purports to protect nonunion employees' rights to refrain from supporting political and noncollective bargaining causes. OEA thus established the collection plans and disseminated the "financial disclosure" which are the subject of this litigation.

the nonunion employees until months *after* they were required to object to the agency fee collections. The unions *unilaterally* selected their own "arbitrator" to decide challenges to the agency fee calculation. *See* Appendix ("App.") D at 64a-67a.

Under the second union rebate plan (covering the 1986-87 academic year), employees could get an "advance reduction" of that portion of the dues that the unions admitted was nonchargeable *only* if they waived their right to challenge the amount of the fee before an "impartial decisionmaker." If an employee refused to waive that right, he was required to pay a fee equal to full union dues. Furthermore, the nonunion employees received no audited financial disclosure until *after* the start of the agency fee deductions. *See* App. D at 67a-71a.

When the school board began deducting fees in the 1986-87 academic year, the teachers sought a preliminary injunction to stop further collections. They also sought complete reimbursement of *all* fees that had been unlawfully collected from them pursuant to the 1986-87 rebate plan. The district court issued a preliminary injunction on December 17, 1986, but allowed the school board to continue collecting fees so long as they were placed in an escrow account. The district court refused to order the return of all fees that had been seized, despite its conclusion that there was a "strong likelihood" that the teachers would "succeed on the merits with respect to the lack of advance notice." App. C at 35a-37a.

The court of appeals reversed on August 11, 1988, holding that placing the fees into escrow was "an abuse of discretion" when "the district court has found it likely that the procedures will be found, on the merits of the case, to violate *Hudson*." Rather, the court of appeals held, *Hudson* required the district court to enjoin all collections of the agency fee. Of particular importance, the court of appeals ordered the complete return of all fees taken and held in escrow under the 1986-87 rebate plan. App. B at 27a-28a.

In the interim, on October 21, 1987, the district court ruled on the merits. It struck down both the 1985-86 and 1986-87 rebate plans as unconstitutional in numerous respects. No appeal was taken from that decision by the unions or the school board. *See* App. D at 64a-71a.

Instead, the unions moved for partial reconsideration with regard to one aspect of their plans. They also asked the district court to approve yet a third rebate plan, which governed the agency fee collections for the 1987-88 school year. That plan included a "local union presumption" which stated that:

> [t]he percentage of chargeable expenditures by local and district associations will be presumed by the arbitrator to be whatever percentage is found to be appropriate for chargeable OEA expenditures. Since the local and district associations spend a significantly larger percentage of their budgets on chargeable expenditures, this presumption means that objectors will be charged less than they lawfully could be charged.

Under this "presumption," the nonunion employees were provided with no audited financial disclosure concerning the chargeable vs. nonchargeable expenditures for their local union and its district union affiliate. App. E at 106a-109a.

On March 2, 1988, the district court granted the unions' motion for partial reconsideration, but concluded that there were "numerous other constitutional deficiencies in the [1985-86 and 1986-87] plans rendering them constitutionally inadequate notwithstanding * * * reconsideration." App. E at 98a-99a. Despite those numerous defects, the court held that the teachers were not entitled to restitution of all fees collected in those years, but only to nominal damages and "a return of all monies determined to be nonchargeable by the impartial decisionmaker" under the unions' third collection plan. *Id.* at 115a. The court upheld the "local presumption" used in the third plan, albeit reluctantly. *Id.* at 108a-109a. Later, on a second motion for reconsideration filed by the unions, the district court held that *Hudson* should not

be applied retroactively and denied the teachers any relief for the collection of agency fees under the unconstitutional 1985-86 plan. App. F at 128a-134a.

The district court entered judgment in accordance with its opinions on November 18, 1988. The teachers filed a timely appeal, and on May 17, 1990, the Sixth Circuit reversed in part and affirmed in part. The court of appeals held that the "local presumption," and thus the 1987-88 plan, is unconstitutional and that *Hudson* applies retroactively. App. A at 6a-17a. However, notwithstanding the fact that under its ruling none of the unions' plans are constitutional, the court of appeals affirmed the holding that the teachers are not entitled to full restitution, but only to nominal damages and return of that portion of the fees that an "arbitrator" appointed under the aegis of the third unconstitutional plan had ruled to be allocable to constitutionally nonchargeable activities. *Id.* at 17a-21a. This Petition follows.

REASONS FOR GRANTING THE WRIT

I. THE LOWER COURTS' USE OF A "BALANCING" TEST TO DENY COMPLETE RESTITUTION OF ALL ILLEGALLY SEIZED AGENCY FEES IS CONTRARY TO THE CLEAR IMPORT OF *HUDSON*: THAT THE UNIONS HAD NO RIGHT TO SEIZE *ANY* AGENCY FEES UNTIL THEY ESTABLISHED AND MAINTAINED PLANS WHICH FULLY COMPLIED WITH *HUDSON*.

A) In *Hudson*, 475 U.S. at 309, this Court held that unions seeking to collect agency fees are required to establish *pre-collection* procedures to safeguard the right of nonunion employees to refrain from supporting the political, ideological and other non-collective bargaining causes of the union, because "the agency shop itself impinges upon the nonunion employees' First Amendment interests." The "effect of the Court's holding [in *Hudson*] was to disallow the collection of representation fees," where, as here, the procedures are constitutionally defective.

Robinson v. New Jersey, 806 F.2d 442, 446 (3d Cir. 1986), *cert. denied*, 481 U.S. 1070 (1987); *accord, Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987); *Lowary*, 854 F.2d at 134-35. The lower courts have been virtually unanimous in holding that the establishment of valid *Hudson* safeguards is a necessary pre-condition to *any* agency fee collections, even the allegedly "chargeable" amounts. *See, e.g. Lehnert v. Ferris Faculty Association*, 643 F. Supp. 1306, 1335 (W.D. Mich. 1986) (enjoining collection of *all* agency fees pending establishment of valid *Hudson* plan); *Ellis v. Western Air Lines*, 652 F. Supp. 938, 939-40 (S.D. Cal. 1986).

In *Hudson*, after finding that the union failed to meet the First Amendment's pre-collection requirements, this Court advised the district court that the "judicial remedy for a proven violation of law will often include commands that the law does not impose upon the community at large." 475 U.S. at 309 n. 22. In this case, the lower courts have found not one, but *three* sets of proven constitutional violations, covering three successive academic years. At no time during this litigation did the unions have a procedure in place which fully met the requirements of *Hudson*. This case thus presents the Court with a concrete opportunity to decide what remedies must be ordered when unions and public employers make agency fee collections while violating public employees' rights under *Hudson*. The district court and the Sixth Circuit, even while holding that all of the agency fee seizures were unconstitutional, refused to order the complete return of the teachers' property, thus negating a critical part of *Hudson*: that the existence of a valid procedure is a pre-condition to *any* entitlement to any agency fee money, even that portion which allegedly goes to support collective bargaining activities.

B) The discretion which the district court had in fashioning equitable relief regarding the unions' repeated constitutional violations did not permit it to deny *effective* relief to the teachers. The finding of a constitutional violation:

> impose[s] a duty on the District Court to grant appropriate relief. Our prior decisions counsel that in the event of a constitutional violation "all reasonable methods be available to formulate an effective remedy, 'and that every effort should be made by a federal court to employ those methods' to achieve the greatest possible degree of [relief], taking into account the practicalities of the situation."

Hills v. Gautreaux, 425 U.S. 284, 297 (1976) (alteration in original, citations omitted) (quoting *North Carolina State Board of Education v. Swann*, 402 U.S. 43, 46 (1971), and *Davis v. School Commissioners*, 402 U.S. 33, 37 (1971)). This duty to provide *effective* relief is "premised on a controlling principle governing the permissible scope of federal judicial power, a principle not limited to the school desegregation context." *Hills*, 425 U.S. at 294, n. 11; *see also Spallone v. United States*, ___ U.S. ___, 110 S.Ct. 625, 632 (1990) ("When a district court's order is necessary to remedy past discrimination, the court has an additional basis for the exercise of broad equitable powers.") The district court's relief must also serve to "avoid a recurrence of the violation." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978); *see also United States v. Paradise*, 480 U.S. 149, 190-95 (1987) (Stevens, J., concurring); *Hudson*, 475 U.S. at 309 n. 22.

In order to provide an effective remedy that would avoid recurrences of the unions' repeated unconstitutional conduct, the lower courts should have ordered the return of all of the teachers' illegally seized fees. Instead, the lower courts declined to provide complete restitution because they believed it necessary to "balanc[e] the interests of plaintiffs with the interests of defendants." App. A at 20a; *see also* App. E at 114a-115a. This use of a "balancing test" to deny complete restitution was erroneous as a matter of law for several reasons.

First, the lower courts failed to recognize that the rights of the teachers and the unions are not in equipoise. The unions have *no* constitutional rights at stake in this case because an

agency shop is a creature of statute and contract only. They have no constitutional right to engage in collective bargaining, *Smith v. Arkansas State Highway Employees*, 441 U.S. 463 (1979), or, more specifically, to compel others to support even their bargaining activity. *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 531 (1949); *cf. City of Charlotte v. Local 660, International Association of Firefighters*, 426 U.S. 283, 286 (1976) (union members are entitled to no preferential treatment under the Fourteenth Amendment). It certainly follows that the unions have no *constitutional* right to collect a cent from the teachers in the absence of a lawful collection plan.

The *only* constitutional interests which need protection here are the teachers' First Amendment rights. Those fundamental rights are implicated by the collection of even the allegedly "chargeable" portion of the agency fee, because the mere existence of an "agency shop" arrangement "is 'a significant impingement on First Amendment rights of nonunion employees.'" *Hudson*, 475 U.S. at 301 & n.8, 307 n.20 (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984)); *accord*, App. A at 17a.

Thus, the lower courts erred in viewing the interests of the unions and the teachers as equivalent. The unions must be held to have forfeited their mere *contractual* claim to collect a fee by their failure, in three successive years (1985-86, 1986-87 and 1987-88), to properly meet their pre-collection *constitutional* responsibilities. *See Hudson*, 475 U.S. at 309 n. 22 ("the judicial remedy for a proven violation of law will often include commands that the law does not impose upon the community at large").

Furthermore, this Court has recently held that where unconstitutional tax seizures occur, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward looking relief to rectify any unconstitutional deprivation." *McKesson Corp. v. Florida Alcohol & Tobacco Division*, ___ U.S. ___, ___, 110 S. Ct. 2238, 2247 (1990) (footnotes omitted). In this case, the respondents, like the State of Florida in *McKesson*, did not provide the teachers any meaningful opportunity to challenge the agency fee seizures before they

occurred. Rather, the teachers had only a post-collection opportunity to challenge the automatic seizures from their paychecks. Under these circumstances, as this Court stated in *McKesson*, the teachers must be provided with a "clear and certain remedy." *Id.*, 110 S. Ct. at 2251. *McKesson* also indicated that the preferable course in cases of unconstitutional seizures is to "erase the property deprivation itself by providing petitioner with a full refund." *Id.*, 110 S. Ct. at 2252.[3]

For all of these reasons, the teachers submit that this Court's precedents require the complete return of all of their illegally seized agency fees.[4]

II. THE LOWER COURTS ARE DIVIDED OVER THE NEED FOR COMPLETE RESTITUTION ONCE IT IS SHOWN THAT AGENCY FEE SEIZURES ARE INVALID UNDER *HUDSON*.

The lower courts have issued conflicting opinions over the need to provide complete restitution where agency fees have been collected in the absence of a constitutionally valid collection

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[3] Because of the unique nature of the taxing system, and the specific type of constitutional violation found under the Florida tax system, *McKesson* indicated that the state could provide adequate retrospective relief in ways other than the complete return of all of the illegally seized taxes. *Id.*, 110 S. Ct. at 2252. We submit that under the logic of *Hudson*, however, those other alternatives are not available to the unions and the Lexington Local Board of Education. *See infra* at pages 6 to 10.

[4] The defect in the third union rebate plan (for the academic year 1987-88) is its use of the "local union presumption." Through this device, the unions provided the teachers with no audited and detailed disclosure regarding the chargeable vs. nonchargeable expenses of their local and district union affiliates. App. A at 14a-17a; see also footnote 2, *infra*. Because that defect is arguably related solely to those two affiliates, the teachers seek restitution of only the portions of the 1987-88 agency fees collected on behalf of those affiliates.

plan. Perhaps the most striking example of this conflict is shown by the history of this case.

The first Sixth Circuit panel, when reviewing the denial of a preliminary injunction against collection, where the district court had only found a likelihood of success on the merits, ordered the complete return of all fees that had been collected. App. B at 27a-28a. However, when confronted with a final judgment striking down the unions' plans, and thus *proven* constitutional violations, the later Sixth Circuit panel refused to order the same relief. App. A at 18a-20a. The latter panel sought to distinguish the first panel's decision by pointing out that it "preceded the establishment of a proper mechanism for determining the amount the fees which could be extracted." However, that is precisely the situation on this appeal, because *all* of the unions' successive procedures have been held unconstitutional by the courts below. Thus, as on the first appeal, the unions have never been entitled to collect anything from the teachers for the years in question and return of all of the fees taken from them unconstitutionally is the only "award that *fully* compensates the [proven] injury." *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 310 (1986) (emphasis added).

In contrast to the later Sixth Circuit panel's inconsistency, other courts have followed the original panel's holding and ordered full restitution after final judgments that union agency fee procedures fail to satisfy *Hudson*. In *Toledo Federation of Teachers v. Gibney*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1989), the Ohio Supreme Court explicitly read the first panel's decision in this case as requiring complete restitution after a final judgment that fees had been seized in violation of *Hudson*. In *Elvin v. Oregon Public Employees Union*, 102 Or. App. 159, 793 P.2d 338 (1990), the court recognized the conflict of authority on this issue, and ordered restitution nonetheless.

Other courts have determined that restitution is necessary in these circumstances without citing the first panel's decision in this case. In *Gillespie v. Willard City Board of Education*, 700 F. Supp. 898, 902 (N.D. Ohio 1987), the court required complete

restitution of all illegally seized fees, but noted (in what must be considered as *dictum*) that the union would be able to re-collect those fees in the future if it adopted a constitutionally valid plan.[5] Most recently, in *Jordan v. City of Bucyrus*, ___ F. Supp. ___, 1990 WL 91380 (N.D. Ohio 1990), the district court ordered complete restitution of all agency fees where it found that a public employer had collected them in violation of *Hudson*.[6] Contrary decisions can be found among other lower courts. *See Gilpin v. AFSCME*, 875 F.2d 1310, 1316, (7th Cir. 1989), *cert. denied*, 110 S. Ct. 278 (1989); *Hohe v. Casey*, 727 F.Supp. 163, 167-68 (M.D. Pa. 1989).

In short, there is a clear split of authority over the need for complete restitution of all agency fees seized in violation of *Hudson*. This Court should grant this Petition to resolve the issue.

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[5] The question of retroactive collection was not presented in *Gillespie* any more than it is presented here, since in neither case has the court approved a constitutionally adequate plan.

[6] In cases arising under analogous labor statutes, restitution of illegally collected dues and fees has often been ordered. As early as 1943, this Court recognized that complete return of all illegally collected dues was an appropriate remedy under the National Labor Relations Act. *See Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 539-545 (1943) (the issue of whether or not the employees may have received "benefits" from the union bargaining that they might otherwise not have enjoyed is *immaterial* to the propriety of any reimbursement order); *see also Local 1814, ILA v. NLRB*, 735 F.2d 1384, 1404 n.27 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1072 (1984); *NLRB v. Vernitron Electronical Components, Inc.*, 548 F.2d 24, 27 (1st Cir. 1977); *Chicago Typographical Union No. 16*, 268 NLRB 347 (1983).

Similarly, under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, restitution has been approved as a remedy in analogous cases involving violation of the procedural rules for increasing union dues under § 411(a)(3). *See, e.g., Stolz v. United Brotherhood of Carpenters, Local Union No. 971*, 620 F. Supp. 396, 401 (D. Nev. 1985); *Gravenstein v. Campion*, 96 F.R.D. 137 (D. Ak. 1982).

III. EVEN IF COMPLETE RESTITUTION IS NOT REQUIRED, THE LOWER COURTS ABDICATED THEIR JUDICIAL DUTIES IN HOLDING THAT, IN THIS CIVIL RIGHTS ACTION UNDER 42 U.S.C. § 1983, THE MEASURE OF THE DAMAGES DUE THE TEACHERS IS THE DECISION OF THE "ARBITRATOR" APPOINTED UNDER THE UNIONS' UNCONSTITUTIONAL COLLECTION PROCEDURES.

The district court ruled, over the teachers' objection, that the measure of their damages for the unconstitutional agency fee seizures was the nonchargeable portion as previously determined, in proceedings in which they did not participate, by the "impartial decisionmaker" appointed under the union's unconstitutional collection procedures. App. E at 114a-115a; *see* App. A at 20a-21a. The court of appeals affirmed, holding that "[r]eferral" to that decisionmaker of the issue of what union expenses are constitutionally chargeable to the teachers was a permissible alternative to trial and determination by the district court. That holding is directly contrary to the decisions of this Court as to the burden of proof in cases such as this, and sanctions an unconstitutional abdication of the duties of the federal judiciary which departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision. *See* Sup. Ct. R. 10.

Even assuming *arguendo* that unilateral selection of the "impartial decisionmaker" by the American Arbitration Association ("AAA"), App. D at 70a, qualifies as arbitration, "[a]rbitration is not a 'judicial proceeding.'" *McDonald v. City of West Branch*, 466 U.S. 284, 288 (1984). The finding of a constitutional violation "impose[s] a duty *on the District Court* to grant appropriate relief." *Hills*, 425 U.S. at 297 (emphasis added). That duty is of constitutional dimension. Article III, section 1 of the United States Constitution "preserves to litigants their interest in an impartial and independent *federal adjudication* of claims within the judicial power of the United States." *Commodity Futures Trading Comm'n. v. Schor*, 478 U.S. 833, 850 (1986) (emphasis added). Parties to a case "in a federal forum are entitled to have

the cause determined by Article III judges," except in certain classes of cases. *Pacemaker Diagnostic Clinic v. Instromedix, Inc.*, 725 F.2d 537, 541 (9th Cir. 1984) (en banc, opinion by Kennedy, J.), *cert. denied*, 469 U.S. 824 (1984).

This Court has recognized only four exceptions to Article III's rule against delegation of the federal judicial authority. The first two are in the cases of "military tribunals" and "territorial courts." *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 585 (1985). Those two are clearly inapplicable here.

The third is when parties waive their right to a judicial determination *and* the non-Article III adjudication does not threaten "the institutional integrity of the Judicial Branch." *Schor*, 478 U.S. at 848-51. For example, having federal magistrates conduct civil trials and enter final judgment *with the consent* of all parties does not violate Article III. It does not, because constitutional rights may be waived, and because the Article III judiciary has "extensive administrative control over the management, composition, and operation of the magistrate system," including the power of selecting the magistrates. *Pacemaker Diagnostic Clinic*, 725 F.2d at 541-45.

However, "mandatory provision for trial of an unrestricted class of civil cases by a magistrate and not by Article III judges would violate the constitutional rights of the litigants." *Id.* at 542. That is doubly true here, because the teachers did not consent to determination of any part of their First Amendment claims by an "arbitrator" selected by the AAA, and the federal courts have no control whatsoever over the AAA's scheme for appointing "arbitrators" in agency fee cases.[7]

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[7] Article III presumably does not prohibit the reference of part of a case to a special master under Federal Rule of Civil Procedure 53, even if a party objects, because the court's control is even more direct than in the case of a magistrate. The district court appoints the special master and specifies his

[note continued]

The fourth exception is cases "involving 'public' as opposed to 'private' rights" or in which "Congress, acting for a valid legislative purpose pursuant to its constitutional powers under Article I, [has] create[d] a seemingly 'private' right that is so closely integrated into a public regulatory scheme as to be a matter appropriate for agency resolution with limited involvement by the Article III judiciary." *Thomas*, 473 U.S. at 585, 593-94. That exception, too, is inapplicable here. The rights at stake are individual rights guaranteed by the First Amendment, *Hudson*, 475 U.S. at 301-02, and Congress has created no regulatory scheme for their enforcement.

To the contrary, in 42 U.S.C. § 1983 Congress assigned "'the paramount role'" in protecting constitutional rights "'*to the federal courts*'." *Patsy v. Board of Regents*, 457 U.S. 496, 500 (1982) (quoting *Steffel v. Thompson*, 415 U.S. 452, 472-73 (1974)) (emphasis added). The "'dominant characteristic of civil rights actions'" is that "'*they belong in court*'" and "'are judicially enforceable *in the first instance*.'" *Felder v. Casey*, 487 U.S. 131, 148 (1988) (quoting *Burnett v. Grattan*, 468 U.S. 42, 50 (1984)) (emphasis added by the Court).

Hudson and its precursors established no fifth exception to Article III for the determination of the amount that may constitutionally be charged to objecting nonmembers in a case already pending in federal court, as the court of appeals implied. *See* App. A at 20a-21a. *Railway Clerks v. Allen*, 373 U.S. 113, 122-24 (1963), and *Abood v. Detroit Board of Education*, 431 U.S. 209, 242 (1977), merely suggested in *dicta* that the parties might wish *voluntarily* to use intra-union remedies as a possible means

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powers, the discovery rules and Federal Rules of Evidence apply to the proceedings, and the parties have a right to review of the master's report by the district court. Even then, Rule 53 provides that "reference to a master shall be the exception." If the rule is used to "depriv[e] the parties of a trial before the court on the basic issues involved in the litigation," referral to a special master constitutes "an abdication of the judicial function." *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

of settling their disputes and avoiding future litigation. *See Hudson*, 475 U.S. at 307 n.19. However, both decisions held that, on remand, the nonmembers were entitled, at the least, to a *judicial* "determination of which expenditures were properly to be characterized as" nonchargeable and a decree requiring "the refund of a portion of the exacted funds in the proportion that" nonchargeable expenses bore to total expenses. *Abood*, 431 U.S. at 239-42; *accord Allen*, 373 U.S. at 121-122.

Hudson requires the state, or the union, to provide an "*opportunity* to challenge the amount of the fee before an impartial decisionmaker." 475 U.S. at 310 (emphasis added). It does not authorize courts to defer to that decisionmaker's determinations unless nonmembers "claim that [they] were improper" on the merits, as the court of appeals held. App. A at 20a-21a. *Hudson* specifically ruled that an "arbitrator's decision would not receive preclusive effect in any * * * § 1983 action." 475 U.S. at 308 n.21 (citing *McDonald*). Suggesting that the arbitrator's decision is "entitled to great weight" and making it binding unless *the nonmember* shows where it was wrong on the merits, as the court of appeals did, App. A at 20a & n.3, shifts the burden of proof in these cases and thus directly conflicts with *Hudson* and its precursors.

"The nonmember's 'burden' is *simply* the obligation to make his objection known." *Hudson*, 475 U.S. at 306 n.16 (emphasis added). That burden was met here, as even the court of appeals conceded: the teachers objected to use of the "arbitrator's" decision to determine the refund due them. *See* App. A at 20a.[8] Once that objection was made, "the union retain[ed] the burden of proof" as to "the basis for the proportionate share." *Hudson*, 475 U.S. at 306; *accord, e.g., Ellis v. Railway Clerks*, 466 U.S. 435, 457 n.15 (1984); *Abood*, 431 U.S. at 239 n.40. While the

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[8] The record shows that the teachers also specifically objected, in the district court, that the "decisionmaker" applied an erroneous legal standard for determining chargeable vs. nonchargeable costs. *See* Plaintiffs' Motion for Partial Reconsideration, District Court Docket No. 174, filed March 9, 1988.

"arbitrator's" decision might have been admitted as evidence, the district court still had a duty to determine the propriety of the arbitrator's rulings on the "difficult constitutional questions" of what union activities are chargeable, *Abood*, 431 U.S. at 236-37, and whether there was a factual record sufficient to meet the union's burden of persuasion as to what expenses were incurred for constitutionally chargeable purposes. *See McDonald*, 466 U.S. at 292 n.13; *cf. United States v. Weichert*, 836 F.2d 769, 772-73 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 813 (1989) (fact finding regarding restitution orders in criminal cases may not be delegated to a probation officer, because "such an adjudication is solely a judicial function"). However, the district court required no such evidentiary showing by the unions, but rather, blindly accepted the "arbitrator's" decision.[9] That judicial abdication cannot possibly comport with Article III.

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[9] Even when confronted with an argument that the arbitrator's decision was wrong as a matter of law, *see* Plaintiffs' Motion for Partial Reconsideration (District Court Docket No. 174), the district court refused to review that decision *under any circumstances*:

> The Court's role in evaluating the present plan submitted by the [unions] was to determine whether it meets the constitutionally minimum standards of the first and fourteenth amendments and *not to resolve a claim that the chargeability decision is a correct one under the law. The Court has extinguished its duty to assure that a constitutionally minimum adequate plan is in place and finds that it is unnecessary to determine whether the impartial decisionmaker for the years 1985-86 and 1986-87 employed a proper standard*. Accordingly, the Court denies the plaintiffs' motion for reconsideration to the extent that it seeks to have the Court reconsider its decision on the standard of chargeability as outlined in the new plan.

Order Denying Plaintiffs' Motion for Partial Reconsideration, District Court Docket No. 176, filed March 21, 1988.

CONCLUSION

For the reasons set forth herein, William Lowary and Sara Wyatt pray that this Court grant the Petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

May 17, 1990

William LOWARY & Sara Wyatt,
Plaintiffs-Appellants,

v.

LEXINGTON LOCAL BOARD OF EDUCATION,
Ohio Education Association,
Lexington Teachers Association, et al.
Defendants-Appellees.

No. 88-4191

United States Court of Appeals,
Sixth Circuit

Argued Sept. 28, 1989.

Decided May 17, 1990.

Before: MERRITT, Chief Judge, RYAN, Circuit Judge, and PECK, Senior Circuit Judge.

MERRITT, Chief Judge.

Plaintiffs, dissenting nonunion teachers of a "closed-shop" bargaining unit in Ohio, attack as unconstitutional various procedures contained in the dues collection plan of the local and state teacher's unions. They appeal the adverse portions of the District Court's judgment in their action challenging the constitutionality of three fair share fee provisions in the dues collection plan made a part of a collective bargaining agreement.

Specifically, the two nonunion teachers brought suit pursuant to 42 U.S.C. § 1983 against their employer, the Lexington Local Board of Education (School Board); their local union, the Lexington Teachers Association; and its state affiliate, the Ohio Education Association. They asserted that the so-called "fair

share" fee collections or union dues charged against them violate the Supreme Court's decision in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). They sought relief for the 1985-86 collections, which already had occurred, as well as future collections, particularly the 1986-87 and 1987-88 collections made during the pendency of this litigation.

Four issues are raised on this appeal. First, plaintiffs challenge the District Court's holding that *Hudson* cannot be applied retroactively to allow recovery for the 1985-86 fee collections. Second, plaintiff Wyatt challenges the District Court's absolute denial of all relief for the 1985-86 collections, assuming the retroactive application of *Hudson*, because of her failure to file a formal objection with the union pursuant to the terms of the unconstitutional collection fee plan. Third, plaintiffs object to the District Court's decision to uphold the union's 1987-88 fee collection plan containing a so-called "local union presumption" under which the chargeable portion of the local teacher union dues is presumed to be the same as the chargeable portion of the state teacher union dues. Fourth, plaintiffs challenge the District Court's refusal to order restitution for *all* of the fees which had been collected in 1985-86 and 1986-87 pursuant to the unconstitutional fee collection plans.

We affirm the District Court in part, and reverse the District Court in part. We hold that *Hudson* should be applied retroactively under the three-pronged test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). In addition, plaintiff Wyatt is entitled to relief despite her failure to file a formal objection with the union because the fee plan, including its notice provisions, is unconstitutional. We also hold that the "local union presumption" contained in the 1987-88 plan is unconstitutional. However, we affirm the District Court's order denying restitution for all fees which had been collected in 1985-86 pursuant to unconstitutional fee collection plans. Plaintiffs may recover only the nonchargeable portions of the collected fees.

I. Facts

A collective bargaining agreement between the School Board and the local union provided that those bargaining unit members who did not join the union would be required to have a "fair share fee" deducted from their salaries to defray the costs of union representation. These fair share fee collection provisions changed each year from 1985-87, and fees were collected pursuant to each of these three plans.

A. The 1985-86 School Year

The 1985-86 fee collection plan provided that each nonunion employee must pay an initial fee equal to 100% of the union dues paid by union members. In previous years, both plaintiffs had been informed of certain objection procedures, although no objection procedure information was contained in the plan for the 1985-86 school year. Any teacher who objected to paying the full fair share fee, by following specific objection notice procedures contained in earlier plans, could receive a rebate of any portion paid that would have been used to fund partisan political or ideological causes unrelated to the collective bargaining function of the employee organization. But under the plan, the unions unilaterally selected their own umpire to determine the ultimate amount to be rebated to objecting nonmembers.

Plaintiff Lowary objected and a small portion of his dues was escrowed. Plaintiff Wyatt did not object and none of her fair share fee was escrowed.

Subsequently, the Supreme Court in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), set forth the "constitutional requirements for [a union's] collection of agency fees." *Id.* at 310, 106 S.Ct. at 1078. The Sixth Circuit elaborated on these requirements in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987). Plaintiffs then brought

this suit claiming that defendants' actions failed to meet the procedural requirements set forth in *Hudson* and *Tierney*.

In October 1987, the District Court initially held that the 1985-86 fee collections were unconstitutional under *Hudson* and *Tierney* but that only plaintiff Lowary was deemed entitled to relief because plaintiff Wyatt had failed to make a formal objection under the otherwise unconstitutional plan. Then a year later, on motion of the defendants, the District Court vacated its order as to plaintiff Lowary and denied relief for the 1985-86 fair share fee collections to *both* plaintiffs Lowary and Wyatt, holding that *Hudson* and *Tierney* should not be applied retroactively under the three-pronged test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971).

B. The 1986-87 School Year

The 1986-87 fee collection plan provided that each nonmember might receive notice of the fee collections and financial disclosure prior to the collections. This notice advised each fair share feepayer of his right to an advance reduction of the nonchargeable portion of his fair share fee *only* if he agreed to waive his right to object before an impartial decisionmaker. In other words, an objector could either (1) accept a union-determined rebate and receive that rebate immediately, or (2) pay 100% of his dues into escrow and challenge the Ohio Education Association's determination before an impartial decisionmaker.

The District Court entered a preliminary injunction prohibiting further payroll deductions for fair share fees until the School Board certified that the entire amount deducted would be placed in escrow. An escrow account was established and further deductions occurred. Plaintiffs appealed this preliminary injunction to this Court, which ruled that any collection of the 1986-87 fees was improper (even if held in escrow), and ordered that the escrowed fees be remitted to the plaintiffs. *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988).

On October 21, 1987, the District Court held that the 1986-87 fee collection plan was unconstitutional. Denying plaintiffs' request for the restitution of all of the fees which had been seized pursuant to the unconstitutional fee collection plan, the District Court held that plaintiffs were "entitled to a return of all monies determined to be non-chargeable by the impartial decisionmaker." The impartial decisionmaker, who was selected pursuant to the unconstitutional plan, determined that the bulk of the fees were chargeable. Plaintiffs also were awarded nominal damages and a declaratory judgment.

C. The 1987-88 School Year

In response to this Court's decision in *Tierney*, the unions proposed a revised fee collection plan to take effect for the 1987-88 school year. The District Court found that, in all relevant respects, the procedures satisfied the constitutional requirements established in *Hudson* and *Tierney*, including a "local union presumption" used to calculate the amount of the advance reduction for objecting feepayers. The Court clearly stated that the presumption was not binding on the impartial decisionmaker in determining the ultimate amount of the fee. The "presumption" provides that:

> [t]he percentage of chargeable expenditures by local and district associations *will be presumed by the arbitrator* to be whatever percentage is found to be appropriate for chargeable OEA expenditures. Since the local and district associations spend a significantly larger percentage of their budgets on chargeable expenditures, this presumption means that objectors will be charged less than they lawfully could be charged.

Lowary v. Lexington Bd. of Educ., 704 F. Supp. 1456, 1466-67 (N.D. Ohio 1988). (emphasis added).

Plaintiffs argue that this "local union presumption" allows the unions to avoid providing audited financial disclosure

statements to nonunion employees merely by producing unaudited one-page expenditure sheets. Defendants successfully argued to the District Court that this "presumption" was grounded in an efficiency rationale. This presumption allowed the state teacher's union to compute a single, statewide, advance reduction for the 1987-88 school year for all objecting feepayers, rather than making a particularized analysis for each of the numerous local and district associations that received fair share fees.

Final judgment was entered by the District Court on November 18, 1988, in accordance with all the interlocutory opinions which the court previously had issued. It is from this judgment that plaintiffs appeal.

II. Retroactive Application of *Hudson*, and *Tierney*, in light of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971)

A. Retroactivity of Federal Decisions

Generally, "federal cases should be decided in accordance with the law existing at the time of the decision." *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662 107 S.Ct. 2617, 2621, 96 L.Ed.2d 572 (1987). This rule has deep roots going back in English law before Blackstone, 1 W. Blackstone, *Commentaries* * 69, for as Justice Holmes observed: "Judicial decisions have had retrospective operation for near a thousand years." *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372, 30 S.Ct. 140, 148, 54 L.Ed. 228 (1910) (Holmes, J., dissenting). *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971), provides an exception to this traditional rule of retroactivity when strong reliance on the prior law was justified. *Chevron Oil* states that nonretroactivity may be appropriate in a limited number of circumstances in which it would be inequitable to apply new law to prior conduct taken in reliance on old law. Because there is a presumption in favor of retroactive application, the party invoking *Chevron Oil* must demonstrate all three factors set forth in that case before a federal decision will be denied retroactive

effect. *Lund v. Shearson/Lehman/American Express, Inc.*, 852 F.2d 182, 183-84 (6th Cir. 1988).

B. The *Chevron Oil* Three-Pronged Test — The First Prong

The first and most important part of the *Chevron Oil* test requires that "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which the litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106, 92 S.Ct. at 355 (citations omitted). This "clear break" requirement is a threshold consideration for determining the nonretroactive application of federal decisions. *Id.* Although the District Court recognized that *Hudson* and *Tierney* did not overrule any prior cases, the court held that *Hudson*'s procedural due process requirements, including notice, financial disclosure, and a fair hearing, were not foreshadowed by prior decisions.

According to *Hudson*, the use of an impartial decisionmaker with respect to fair share fee objectors is required and the impartial decisionmaker may not be selected through "the Union's unrestricted choice." *Hudson*, 475 U.S. at 308, 106 S.Ct. at 1077. Prior Supreme Court cases, however, merely had suggested the "desirability of an internal union remedy," rather than requiring an impartial, independent decisionmaker. *Id.* at 307 n.19, 106 S.Ct. at 1076 n.19, 106 S.Ct. at 1076 n.19 (citing *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 240 & n.41, 97 S.Ct. 1782, 1802 & n.41, 52 L.Ed.2d 261 (1977); *Railway Clerks v. Allen*, 373 U.S. 113, 122, 83 S.ct. 1158, 1164, 10 L.Ed.2d 235 (1963)). Based on these Supreme Court decisions, the defendants argue that the selection by the union of an independent arbitrator from the National Academy of Arbitrators more than complied with prior precedent. Additionally, *Hudson*'s requirement of a completely independent decisionmaker allegedly was not "clearly foreshadowed."

Tierney articulated the additional requirement that a union must provide objectors with an "advance reduction" of a portion

of the fair share fee. *Tierney*, 824 F.2d at 1505-06. The Supreme Court, in *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), had rejected a pure rebate system, whereby each feepayer paid an amount equal to full union dues and then received, upon objection, a rebate for any nonchargeable portions. Holding that the pure rebate system constituted a forced loan so far as the nonchargeable portion was concerned, the *Ellis* Court suggested the possible alternatives of an "advance reduction of dues and/or interest-bearing escrow accounts." *Id.* at 444, 104 S.Ct. at 1890. Thus, defendants argue that *Tierney*'s requirment of an advance reduction of dues, rather than interest-bearing escrow accounts, was not "clearly foreshadowed" in light of *Ellis*.

Finally, defendants argue that *Hudson*'s requirements of elaborate audited pre-objection financial disclosures was not clearly foreshadowed. Recognizing that *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), and *Goss v. Lopez*, 419 U.S. 565, 581, 95 S.Ct. 729, 739, 42 L.Ed.2d 725 (1975), mandate the procedural due process requirements of notice and a brief statement of the proposed action, defendants suggest that the detailed notice and financial disclosure requirements of *Hudson* were not foreshadowed by prior law. Admitting that some aspects of *Hudson* might have been foreshadowed by prior cases, defendants claim that pre-*Hudson/Tierney* fair share fee jurisprudence did not suggest that the 1985-86 fee collections at issue in this case were constitutionally unsound.

Although none of the specific *Hudson* questions previously had been decided authoritatively by the Supreme Court, this fact alone is insufficient to justify nonretroactive application. In *United States v. Johnson*, 457 U.S. 537, 102 S.Ct. 2579, 73 L.Ed.2d 202 (1982), the Court stated that:

> [A]n entirely new and unanticipated principle of law...has been recognized *only* when a decision explicitly overrules a past precedent of this Court, or disapproves a practice this Court arguably has sanctioned in prior

> cases, or overturns a longstanding and widespread practice to which this Court has not spoken, but which a *near-unanimous body of lower court authority has expressly approved.*

Id. at 551, 102 S.Ct. at 2588 (emphasis added)(citations omitted). In the absence of unusual circumstances, the controlling rule is that:

> [W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases, because the later decision has not in fact altered that rule in any material way.

Id. at 549, 102 S.Ct. at 2586/102 S.Ct. at 2587 & N.12 (citations omitted); *see also id.* at 550 & n.12 (stating that this reasoning is applicable in both criminal and civil contexts). Applying this rule to the facts of this case, we find that although *Hudson* imposed the requirements of an impartial decisionmaker, this requirement was not as unforeseeable as defendants would have us believe.

First, although the Supreme Court has suggested the desirability of an internal union remedy, *Hudson*, 475 U.S. at 307 n.19, 106 S.Ct. at 1076 n.19 "[t]hose opinions did not, nor did they purport to, pass upon the statutory or constitutional adequacy of the suggested remedies." *Ellis*, 466 U.S. at 443, 104 S.Ct. at 1890. The *Abood* Court specifically disclaimed any view as to the constitutional sufficiency of intra-union procedures, and Justice Stevens' concurring opinion suggested their inadequacy. *Abood*, 431 U.S. at 244, 97 S.Ct. at 1804.

Second, a large number of lower court decisions suggested the inadequacy of various intra-union procedures. *See, e.g., Perry v. Machinists Local 2569*, 708 F.2d 1258, 1261-62 (7th Cir. 1983). Most notably, the Seventh Circuit in 1984 held that the

Constitution did not permit the unions to select their own arbitrators so that they might be the judge of their own cases—an obviously inequitable process. *Hudson v. Chicago Teachers Union*, 743 F.2d 1187, 1195-96 (7th Cir. 1984) *aff'd*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). Confusion in the lower courts, and the divergent approaches of those courts to the issue is what led the Supreme Court in *Hudson* to grant certiorari. *Hudson*, 475 U.S. at 300, 106 S.Ct. at 1072-73 (footnote omitted). This confusion, however, does not mandate a finding that *Hudson*'s resolution of the issues was not clearly foreshadowed. In *United States v. Rodgers*, 466 U.S. 475, 484 104 S.Ct. 1942, 1949, 80 L.Ed.2d 492 (1984), the Court plainly stated that "any argument...against retroactive application...[is] unavailing since the existence of conflicting cases...made review of that issue by [the Supreme] Court and decision against the position of the [unions] reasonably foreseeable." *See also Johnson*, 457 U.S. at 559-62, 102 S.Ct. at 2592-94; *Landahl v. PPG Indus., Inc.*, 746 F.2d 1312, 1314-15 (7th Cir. 1984).

Hudson and *Tierney* also impose an advance reduction requirement which defendants allege was not clearly foreshadowed under existing law. Again, defendants incorrectly assume that if the Supreme Court has not spoken directly to the issue then any subsequent definitive statement is not clearly foreshadowed. Prior case law should have alerted defendants to the possibility of this advance reduction requirement. Specifically, the Seventh Circuit's 1984 *Hudson* decision suggested that "advance reductions" might be required when it held that mere "rebates" were insufficient to protect the nonmembers' paramount constitutional rights. *Hudson*, 743 F.2d at 1196.

Finally, *Hudson*'s notice and financial disclosure requirements certainly were foreseeable, flowing directly and logically from the holdings of *Abood* and *Allen*. The *Hudson* Court stated that:

> "Since the unions possess the facts and records from which the proportion of political to total union expenditures can reasonably be calculated, *basic considerations of fairness* compel that they, not the

> individual employees, bear the burden of proving such proportion." *Abood*, 431 U.S., at 239-40, n.40 [97 S.Ct. at 1801-02, n.40], quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 [83 S.Ct. 1158, 1163, 10 L.Ed.2d 235] (1963). *Basic considerations of fairness*, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark...does not adequately protect the careful distinctions drawn in *Abood*.

Hudson, 475 U.S. at 306, 106 S.Ct. at 1075-76 (footnotes omitted)(emphasis added). The *Hudson* Court also supported its holdings by citing to several articles and treatises which discuss the need for due process protections, including notice and financial disclosure, in the First Amendment context. *See Hudson*, 475 U.S. at 303 n.12, 106 S.Ct. at 1074 n.12. Even in the absence of First Amendment interests, "minimum procedural safeguards" under the due process clause include "timely and adequate notice detailing the reasons for a proposed [deprivation of property]." *Goldberg v. Kelly*, 397 U.S. 254, 267-68, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970). Similar procedural safeguards have been required under the statutory duty of fair representation owed by an exclusive bargaining representative to all employees that it represents. *See, e.g., Steele v. Louisville & N.R.R. Co.*, 323 U.S. 192, 204, 65 S.Ct. 226, 232-33, 89 L.Ed. 173 (1944).

While *Hudson* did not overrule any prior cases, its procedural requirements were clearly foreshadowed by prior agency shop decisions as well as First Amendment, due process, and fair representation case law. First, *Hudson*'s requirement of an impartial decisionmaker to process fair share fee objections is not a "clear break" from prior precedent. Despite the Supreme Court's reference to intra-union procedures, this process was not mandated and explicitly was rejected by lower court decisions. Additionally the historical development of due process requirements implicitly would suggest that an impartial

decisionmaker was required. A similar conclusion can be reached as to the notice and financial disclosure requirements of *Hudson*. A potential objector certainly must be given notice of his right to object *before* he decides whether or not to object. *Tierney*'s "advance reduction" requirement also was not a "clear break" from prior precedent. While *Ellis* suggested that interest-bearing escrow accounts *might* be a viable alternative, lower court decisions clearly held to the contrary.

We conclude, therefore, that *Hudson* and *Tierney* should be applied retroactively to the fair share fee collections made pursuant to the 1985-86 agency fee collection plan contained in the collective bargaining agreement. The general rule provides for the retroactive application of federal decisions unless a party can establish all three elements set forth in *Chevron Oil*. Defendants have failed to establish that *Hudson* and *Tierney* either "overrul[e] clear past precedent...or [decide] an issue of first impression whose resolution was not clearly foreshadowed." *Chevron Oil*, 404 U.S. at 106, 92 S.Ct. at 355 (citations omitted). Thus, defendants have failed to meet the threshold requirement of *Chevron Oil*, and *Hudson* and *Tierney* must be applied retroactively. It is unnecessary for us to assess whether defendants could establish the remaining two prongs of *Chevron Oil*.[1]

III. Denial of Relief to Plaintiff Wyatt for Her Failure to Object to the Terms of the Unconstitutional Plan

Holding that *Hudson* and *Tierney* apply retroactively in this case, we must address to what relief, if any, plaintiff Wyatt is entitled. Plaintiff Wyatt did not raise an objection with the union

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[1]The second *Chevron Oil* factor is whether retroactive application will advance the operation of the rule at issue in the case. *Chevron Oil*, 404 U.S. at 106-07, 92 S.Ct. at 355. The third *Chevron Oil* factor is whether retroactive application works a substantial inequity on the party opposing it. *Id.* at 107, 92 S.Ct. at 355.

as to the fair share fee. Plaintiff Lowary did. Thus, the only question is what should be the effect of a nonmember's failure to object to a fair share fee provision contained in an otherwise unconstitutional fee collection plan. The District Court, in denying plaintiff Wyatt any relief because she failed to object to the fair share fee deduction, relied on the general rule that a "dissenting member bears the duty of objecting to the fair share fee before relief is granted." Memorandum Opinion at 36 (citing *Hudson*, 475 U.S. at 306 n.16, 106 S.Ct. at 1075-76 n.16; *Abood*, 431 U.S. at 237-40 & n.40, 97 S.Ct. at 1800-02 & n.40). Normally, assuming valid objection procedures, dissent will not be presumed—it must be affirmatively asserted to the union. *International Ass'n of Machinists v. Street*, 367 U.S. 740, 774, 81 S.Ct. 1784, 1803, 6 L.Ed.2d 1141 (1961).

This principle is inapplicable in this case, however, because the notice procedures and the fee information given under the plan were inadequate. As the Supreme Court observed:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the *potential objectors* be given sufficient information to gauge the propriety of the union's fee. Leaving the nonunion employees in the dark about the source of the figure for the agency fee—*and requiring them to object* in order to receive information—does not adequately protect the careful distinctions drawn in *Abood*.

Hudson, 475 U.S. at 306, 106 S.Ct. at 1075-76 (footnote omitted) (emphasis added).

The District Court's reasoning on the issue of waiver is inconsistent with its analysis which found the union rebate plan to be unconstitutional. In effect, the District Court is penalizing plaintiff Wyatt for not following objection procedures in a union rebate plan which the court ruled to be *unconstitutional* precisely because it failed to provide adequate notice, financial disclosure, and an opportunity for review by an impartial decisionmaker.

The Seventh Circuit in *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir. 1984), *aff'd*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), addressed this exact issue. In rejecting the union's argument that nonmembers who failed to object had no right to challenge the constitutionality of the collection procedures, the Court stated that "[n]one of the plaintiffs followed the prescribed procedure through to the end (some did not invoke it at all), but that is unimportant if the procedure violates their constitutional rights." *Id.* at 1194. Noting that the rebate plan procedures were controlled entirely by the union, the court concluded that "[i]t [was] not surprising therefore that some of the Plaintiffs thought it futile even to ask the union to reduce the fee." *Id.* at 1195.

Our holding against a finding of waiver is perfectly consistent with longstanding Supreme Court precedent on the issue of waiver of constitutional rights. In *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), the Supreme Court noted that "'courts indulge every reasonable presumption against waiver'" of fundamental constitutional rights and that they "'do not presume acquiescence in the loss of fundamental rights'" (citations omitted). Rather, "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Id.* After reviewing the facts of this case, we hold that plaintiff Wyatt did not intentionally abandon a known right. Thus, plaintiff Wyatt is not precluded from seeking relief.

IV. The Local Union Presumption

After striking down two separate union collection plans, the District Court ordered the unions to submit a third proposal. This proposed plan subsequently was approved by the District Court. Plaintiffs challenge one aspect of the plan—the "local union presumption" provision. This provision states that:

> [t]he percentage of chargeable expenditures by local and district associations *will be presumed by the arbitrator* to be whatever percentage is found to be appropriate for

> chargeable OEA expenditures. Since the local and district associations spend a significantly larger percentage of their budgets on chargeable expenditures, this presumption means that objectors will be charged less than they lawfully could be charged. *Lowary*, 704 F.Supp at 1466-67. (emphasis added).

The District Court reluctantly upheld the constitutionality of this local union presumption. Plaintiffs allege that this local union presumption permits the unions to avoid providing audited and detailed financial statements to nonmembers concerning the local and district union affiliates in violation of *Hudson*. We agree.

The most frequently cited rationale in favor of upholding the local union presumption stems from language in *Abood* in which the Supreme Court noted that "[a]bsolute precision in the calculation of [the fair share fee] is not...to be expected or required." *Abood*, 431 U.S. at 239 n.40, 97 S.Ct. at 1802 n 40. Defendants argue that because the state union spends a greater percentage on nonchargeable expenditures than do the local associations, any error in the precision of the presumption actually operates in favor of the nonmember payors. As the District Court noted, however, the defendants failed to provide any empirical evidence which would support the underlying premise of the local union presumption—that the state union spends a greater percentage on nonchargeable expenditures than the local unions.

We agree with the reasoning of the court in *Lehnert v. Ferris Faculty Association—MEA—NEA*, 707 F. Supp. 1473 (W.D. Mich. 1988), *aff'd*, 881 F.2d 1388 (6th Cir. 1989), that such a local union presumption is unconstitutional under *Hudson* and *Tierney*. Specifically, the court rejected the argument that the local union presumption is constitutional merely because it is rebuttable upon an objection to the impartial decisionmaker. Holding the presumption to be unconstitutional, the court noted that "the use of the local presumption increases the risk that the reduced fee collection from the objector would be in excess of what is

appropriate." *Id.* at 1479-80. The presumption "impermissibly shifts the burden of persuasion in the arbitration. 'The non-member's burden is simply to make his objection known.' *Hudson*, 475 U.S. at 306 n.16 [106 S.Ct. at 1075 n.16]...." *Lehnert*, 707 F. Supp. at 1480. The Sixth Circuit has stated that "the burden of showing entitlement to those funds remains with the union, even during arbitration." *Tierney*, 824 F.2d at 1505.

Contrary district court precedent exists, but no courts of appeals opinions challenge this conclusion. *See Hohe v. Casey*, 695 F. Supp. 814, 819 (M.D. Pa. 1988) (holding the presumption to be "reasonable and constitutionally acceptable"), *aff'd*, 868 F.2d 69 (3d Cir. 1989), *cert. denied*, ---U.S.---, 110 S. Ct. 144, 107 L.Ed.2d 102 (1989); *Gillespie v. Willard City Bd. of Educ.*, 700 F. Supp. 898, 903 (N.D. Ohio 1987) (holding the presumption to be constitutional); *Andrews v. Education Ass'n*, 653 F. Supp. 1373, 1378 (D. Conn.), *aff'd as amended*, 829 F.2d 335 (2d Cir. 1987) (holding the presumption to be constitutional, even though in rare cases the presumption may be incorrect).

The Second Circuit has addressed the related issue of the adequacy of an independent audit. In *Andrews v. Education Association*, 829 F.2d 335 (2d Cir. 1987), the court criticized the district court for employing a "balancing test in which the cost to the union and the practicality of the procedures were to be weighed against the dissenters' First Amendment interests." *Id.* at 339. Specifically, the court noted that:

> [T]he procedures mandated by *Hudson* are to be accorded all nonmembers of agency shops regardless of whether the union believes them to be excessively costly. Excessive cost cannot form the basis for allowing the union or the government to avoid *Hudson*'s requirement that the procedures used by the union to allocate bargaining and administrative costs be carefully tailored to minimize the intrusion on the nonmembers' rights.

Id.

Requiring nonmembers to contribute to the cost of collective bargaining involves a substantial interference with their First Amendment right of freedom of association.[2] Although it may be somewhat burdensome on the unions, full disclosure of financial information is a minimal requirement in exchange for this interference. *Hudson* and a due regard for First Amendment values lead to this conclusion. The union must provide detailed information so that the dissenting teachers can understand why they are being charged. Only then can they make an informed decision.

V. Plaintiffs' Rights to Reimbursement for the Money Illegally Collected Pursuant to the 1985-86 Fair Share Fee Plans

Plaintiffs initially sought reconsideration of the District Court's determination that they were not entitled to an award of restitution of all the fair share fees collected pursuant to the 1985-86 and 1986-87 agency fee collection plans. Ordering a return of those monies determined to be nonchargeable by an independent decisionmaker for the years in question, the District Court was persuaded by the defendants' argument that, by ordering total restitution, plaintiffs would enjoy a "free ride" for the two years in question by not having to pay even for chargeable expenses.

Plaintiffs challenge the District Court's decision in two ways. First, the District Court allegedly erred in denying plaintiffs' request for complete restitution of all fees. Second, plaintiffs object to the use of a decisionmaker, appointed under the

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[2]In *Ellis v. Railway Clerks*, 466 U.S. 435, 455, 104 S.Ct. 1883, 1896, 80 L.Ed.2d 428 (1984), the Supreme Court expressed this thought as follows: "But by allowing the union shop at all, we have already countenanced a significant impingement on First Amendment rights. The dissenting employee is forced to support financially an organization with whose principles and demands he may disagree."

provisions of the unconstitutional fee collection plans, to determine the amount of restitution to be awarded to plaintiffs.

A. Denial of Complete Restitution

Plaintiffs rely heavily on this Court's decision in *Lowary*, 854 F.2d 131, in arguing that the District Court's denial of complete restitution to plaintiffs is erroneous as a matter of law and equity. *Lowary* resulted from an appeal of a preliminary injunction ruling by this same District Court ordering that plaintiffs' fees be held in escrow, despite a finding of "strong probability" of success on the merits that the collections were unconstitutional. In reversing the District Court's escrow order, this Court held that a showing of probable success, short of proving an actual *Hudson* violation, entitled plaintiffs to prompt restitution of all the money that had been improperly seized. *Id.* at 134.

Plaintiffs argue that because they have proven an actual violation of *Hudson*, they should be entitled to the same restitutionary relief. The District Court, however, refused to read *Lowary* expansively. Rather, the District Court balanced the interests of plaintiffs and the unions and concluded that it would be inequitable to require the unions to return all of the fair share fees collected from plaintiffs. Although some undetermined part of these fees was unconstitutionally seized, plaintiffs would be "free riders" to the extent that plaintiffs were allowed to recover their validly chargeable expenses. The District Court distinguished *Lowary*, noting that the Sixth Circuit's review was limited to whether the escrow of fair share fees, collected after the District Court's preliminary holding that it was likely that the collection procedures violated *Hudson*, was permissible. The Sixth Circuit simply concluded that the escrow was not permissible. By contrast, the District Court characterized this case as addressing the question of the appropriate remedy once a fair share fee plan has been held unconstitutional.

We find several flaws in plaintiffs' argument for restitution. Our primary concern is that awarding total restitution to plaintiffs

will undermine the policy concerns of *Abood*. Admittedly, one objective of *Abood* is to protect nonunion employees from "compulsory subsidization of ideological activity" to which the employee objects. *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800. Another objective of *Abood*, however, is "to require every employee to contribute to the cost of collective-bargaining activities." *Id.* Additionally, *Hudson* leaves undisturbed the traditional rule that the proper remedy for an unconstitutional fee collection is not a refund of the total fee, but "the refund...of a portion of the exacted funds in the same proportion that union [nonchargeable] expenditures bear to total union expenditures...." *Allen*, 373 U.S. at 122, 83 S.Ct. at 1164. Actually, the *Hudson* Court refused to rule that a complete escrow was required after an objection precisely because "[s]uch a remedy has the serious defect of depriving the Union of access to some...funds that it is unquestionably entitled to retain." *Hudson*, 475 U.S. at 310, 106 S.Ct. at 1077.

Plaintiffs also misinterpret our decision in *Lowary*. While this Court did require a cessation of collection and release of escrowed funds, this determination preceded the establishment of a proper mechanism for determining the amount of the fees which could be extracted. *Id.* at 133-35. Thus, plaintiffs were not guaranteed a free ride after appropriate procedures for determining the proper fee amount were established. This question was expressly reserved by *Tierney*, 824 F.2d at 1507 n.4, and the *Lowary* Court did not purport to decide this issue.

By allowing unions to retain the chargeable portions of unconstitutionally collected fair share fees we do not believe we are creating a disincentive for unions to comply with *Hudson* and *Tierney*. This argument in favor of full recovery was rejected in both *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978), and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986). Specifically, the Supreme Court held that "[t]o the extent...Congress intended [that] the awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the

award of compensatory damages." *Carey*, 435 U.S. at 256-57, 98 S.Ct. at 1048-49 (citation omitted); *see also Stachura*, 477 U.S. at 310, 106 S.Ct. at 2544.

Balancing the interests of plaintiffs with the interests of defendants, we conclude that plaintiffs are entitled to recover only the nonchargeable portion of the unconstitutionally collected fees. If lawful collection procedures had been used, plaintiffs would have had to pay a fair share fee based on the union's chargeable expenditures. To allow plaintiffs to recover for both chargeable and nonchargeable expenditures would constitute a windfall to plaintiffs.

B. Referral of Refund Decision

Plaintiffs object to the use of an impartial decisionmaker, appointed pursuant to the unconstitutional fee collection plan, to determine the nonchargeable portions of the improperly collected fees. Implicit in plaintiffs' argument is that they would require the District Court to examine financial documents, and conduct a trial in order to make this determination. While the District Court might have pursued this course, it was not required to do so. Rather, the Supreme Court has suggested that courts should not involve themselves in the factual inquiries involved in making a chargeability determination. *See Allen*, 373 U.S. at 123-24, 83 S.Ct. at 1164-65; *Abood*, 431 U.S. at 240, 97 S.Ct. at 1802; *see also Tierney*, 824 F.2d at 1504-05.

Clearly, any determination by an independent arbitrator "would not receive preclusion effect in a subsequent § 1983 action." *Hudson*, 475 U.S. at 308 n.21, 106 S.Ct. at 1077 n.21 (citing *McDonald v. West Branch*, 466 U.S. 284, 104 S.Ct. 1799, 80 L.Ed.2d 302 (1984)).[3] In this case, however, plaintiffs do not

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[3]The independent arbitrator's determination, however, likely would be entitled to great weight.

claim that the decisionmaker's determinations were improper. Rather, plaintiffs only object to the use of the procedure.

We also reject plaintiffs' argument that the use of this "decisionmaker" is an exhaustion of remedies procedure contrary to the teachings of *Patsy v. Florida Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), and other cases which suggest that plaintiffs may bypass all union procedures in a § 1983 challenge. Plaintiffs are not being required to operate under the unconstitutional plan. Rather, the District Court has lifted this procedure from the plan and instituted it as the procedure by which the nonchargeable portions of the improperly collected fees should be determined.

Accordingly, we affirm the District Court in part and reverse the District Court in part. We remand with instructions that (1) *Hudson* should be applied retroactively under the three-pronged test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971); (2) plaintiff Wyatt is entitled to relief despite her failure to file a formal objection with the union as required by the unconstitutional agency fee plan; (3) the "local union presumption" is unconstitutional; but (4) plaintiffs Wyatt and Lowary are entitled to recover only the nonchargeable portions of the collected fees, not the total amount of fees collected.

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

August 11, 1988

William LOWARY & Sara Wyatt,
Plaintiffs-Appellants,

v.

LEXINGTON LOCAL BOARD OF EDUCATION; Robert Whitney; Mark Plotnick; Susan Umbarger; James Bollinger; Rick Bell; and Helen Gilroy, Defendants-Appellees.

No. 87-3023

United States Court of Appeals,
Sixth Circuit.

Argued Nov. 10, 1987.

Decided Aug. 11, 1988.

Before KRUPANSKY and RYAN, Circuit Judges, and CONTIE, Senior Circuit Judge.

RYAN, Circuit Judge.

Plaintiffs-appellants are non-union teachers employed by the defendant-appellee School Board. Another defendant-appellee, a union, is the exclusive bargaining representative for all the teachers employed by the School Board. The plaintiffs brought a civil rights action challenging the constitutionality of the union's agency fee collection procedures and sought to enjoin the collection of all agency fees pending a decision on the merits. The district court found that there was a strong likelihood that the union's procedures would be found constitutionally infirm due to the lack of advance notice of the rebate procedure and adequate information regarding the basis for the fee charged to non-union members. Therefore, the court decided to enjoin the collection of agency fees unless the School Board created an escrow account for placement of the fees, which it did. The plaintiffs appeal from the district court's failure to enjoin *all* collection of agency fees. We have recently held that no action

can be taken to enforce a non-union member's duty to pay any dues until a plan providing the constitutionally required procedures set forth in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986), is in effect. *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987). Accordingly, we find that the district court abused its discretion by permitting the collection and placement of fees in an escrow account when it found that the procedures established to protect non-union members were likely to be found constitutionally insufficient in the subsequent action on the merits. Therefore, we reverse.

I.

The plaintiffs-appellants, William Lowary and Sara Wyatt, are teachers employed by defendant-appellee, the Lexington Local Board of Education (School Board). Defendant-appellee, the Lexington Teachers Association (LTA), the teachers' union, is an affiliate of defendant-appellee the Ohio Education Association (OEA). The plaintiffs are not members of either of these organizations but are represented exclusively by the LTA for the collective bargaining purposes of Ohio Rev.Code § 4117.05 (Supp.1986). Under Ohio law, the LTA must "fairly represent" all the teachers and may collect a "fair-share fee," not to exceed the amount of members' dues, from non-members. Ohio Rev.Code §§ 4117.09(C), 4117.11(B)(6) (Supp.1986). Additionally, a rebate procedure must be provided to insure that non-union teachers' fees are not used to support "partisan politics or ideological causes not germane to the work of employee organizations in the realm of collective bargaining." Ohio Rev.Code § 4117.09(C).

In this case, the fee charged to non-members is equivalent to the fee charged to members. The agency fees involved are collected pursuant to a collective bargaining agreement between the LTA and the School Board which provide for the School Board to deduct agency fees from the teachers' salaries. The

School Board forwards the funds to the LTA which in turn forwards some of the funds to the OEA.

The plaintiffs initiated a suit pursuant to 42 U.S.C. § 1983 alleging the procedures provided to them in connection with the collection of their agency fees did not adequately safeguard their first amendment rights because they did not comport with the constitutional requirements espoused in *Chicago Teachers Union Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). On November 12, 1986, plaintiffs sought a temporary restraining order to prevent the School Board from deducting agency fees from their salaries until the defendant showed that they complied with the procedures established in *Hudson*. On November 14, 1986, before the district court could rule on this motion, the School Board deducted a periodic agency fee payment from the plaintiffs' salaries which it eventually turned over to the LTA.

At the time the November 14, 1986, deduction was made, the plaintiffs had not been given formal notice of the "rebate" procedure, formal notice of an opportunity to object, or any independently audited financial disclosure indicating how the union spent the agency fee money. On November 24, 1986, the plaintiffs' motion for a temporary restraining order was granted, and *all* collection of agency fees was enjoined. An evidentiary hearing on the plaintiffs' motion for a preliminary injunction was held on December 1, 1986.

The district court ruled on the plaintiffs' motion for a preliminary injunction on December 17, 1986. The court noted that "the defendant union's failure to comply even minimally with the notice procedural safeguard outlined in *Hudson* makes it appear likely that the unions will be found to have violated the plaintiffs' first amendment rights," and decided that it would enjoin the collection of all agency fees unless the School Board set up an interest-bearing escrow account for the fees to be placed in pending the decision on the merits of the plaintiffs' case. On December 22, 1986, an escrow account was set up by the School Board and thereafter the Board began deducting

agency fees equal to 100% of members' fees from the non-member teachers' salaries. On January 22, 1987, the plaintiffs' motion to stay the district court's order and issue an injunction pending an appeal from the district court's order was denied.

On February 5, 1987, the district court granted the defendants' motion to continue the trial on the merits. In its order, the court stated, "For good cause shown and upon the agreement of the defendants that no further payroll deductions will be taken from plaintiffs Lowary and Wyatt until this matter has been tried and decided, the trial in this matter is hereby continued until further order from this Court." Thereafter, no deductions of agency fees have been taken from the plaintiffs' salaries.

II.

Initially we must address the defendants' assertion that this appeal should have been dismissed as moot because the plaintiffs have obtained all the relief they sought since the fair-share fees are no longer being deducted from their salaries. If a party has already obtained all the relief sought on appeal, the case is moot and must be dismissed. *DeFunis v. Odegaard*, 416 U.S. 312, 316-17, 94 S.Ct. 1704, 1705-06, 40 L.Ed.2d 164 (1974). The mootness doctrine is equally applicable to an appeal challenging the propriety of preliminary injunctive relief. *University of Texas v. Camenisch*, 451 U.S. 390, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981). Clearly, the plaintiffs sought to obtain a determination that the district court should have enjoined the defendants from further collection of agency fees. However, the plaintiffs' assertion that impliedly they sought the return of funds collected under the district court's order allowing the escrow plan is well taken. If it is determined that the district court did improperly fail to enjoin the collection of *all* agency fees, the plaintiffs would be entitled to have the funds collected pursuant to that improper order returned. The Supreme Court has recognized that even if the primary relief sought has been obtained, if secondary relief sought has not been obtained, that portion of the case related to the

secondary relief is not moot. *Camenisch*, 451 U.S. at 394, 101 S.Ct. at 1833. Therefore, we find that this appeal is not moot.[1]

III.

On review of the grant or denial of a preliminary injunction, this court's role is to determine whether the district court abused its discretion. *Christian Schmidt Brewing Co., v. G. Heileman Brewing Co.*, 753 F.2d 1354, 1356 (6th Cir.), *cert. dismissed*, 469 U.S. 1200, 105 S.Ct. 1155, 84 L.Ed.2d 309 (1985). A district court abuses its discretion when it improperly applies the law or uses an erroneous legal standard. *Id.* The plaintiffs contend that the district court's failure to enjoin the collection of all agency fees is contrary to the Supreme Court's decision in *Hudson*.

The constitutionality of a public employer designating a union as the exclusive bargaining representative of its employees, and requiring non-union employees, as a condition of employment, to pay a fair share of the expenses of managing the collective bargaining agreement, is well settled. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). It is equally clear that non-union employees have a first amendment right to "prevent the Union's spending a part of their required service fees to contribute to political candidates and to express political views unrelated to its duties as exclusive bargaining representative." *Hudson*, 475 U.S. at 302, 106 S.Ct. at 1073 (quoting *Abood*, 431 U.S. at 234, 97 S.Ct. at 1799). In *Hudson*, the Supreme Court set forth procedural safeguards

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[1]We are also aware of the fact that the plaintiffs' underlying case has been heard on the merits and the district court has found the defendants' rebate plan unconstitutional. *Lowary v. Lexington Local Bd. of Educ.*, No. C86-1536A, (N.D.Ohio October 21, 1987). However, the district court has not entered a final judgment pending its determination of an appropriate remedy. The escrow account has not been terminated and the plaintiffs' funds in that account have not been returned to them. Therefore, we believe that the district court's order does not moot the issues presented in this appeal.

designed to insure that fair-share fee collection procedures were "carefully tailored to minimize the infringement" upon non-union members' first amendment rights. *Id.* 475 U.S. at 303, 106 S.Ct. at 1074.

Hudson set forth three constitutional criteria which a fair-share collection plan must meet. First, the procedure must include a "procedure which will avoid the risk that [nonmembers'] funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining." *Id.* at 305, 106 S.Ct. at 1075 (quoting *Abood*, 431 U.S. at 244, 97 S.Ct. at 1804 (concurring opinion)). Second, the plan must provide "nonmembers with[ ] adequate information about the basis for the proportionate share." *Id.* at 306, 106 S.Ct. at 1075; *Tierney*, 824 F.2d at 1503. Third, the procedure must "provide for a reasonably prompt decision by an impartial decisionmaker." *Hudson*, 475 U.S. at 307, 106 S.Ct. at 1076.

In *Tierney*, this Circuit decided that:

> no union or employer may take any action to enforce a non-union member's duty to pay any dues, whether through a deduction from wages or payment from wages already paid, until a plan with procedures meeting the commands of *Abood* and *Hudson* is established and operating.

824 F.2d at 1504. Today, we find that once a non-union member has objected to the current procedures in place for the collection of fair-share fees on the ground that these procedures do not satisfy the constitutional requirements set forth in *Hudson*, and the district court has found it likely that the procedures will be found, on the merits of the case, to violate *Hudson*, it constitutes an abuse of discretion for the court to allow fair share fees to be collected even if the collected fees are placed in an escrow account. Such a remedy is contrary to the Supreme Court's decision in *Hudson* as later interpreted by this court in *Tierney*.

IV.

Accordingly, we REVERSE the district court's order allowing the fair-share fees to be collected and placed in the escrow account. Likewise, the escrow account is to be disbanded and the fees previously placed therein remitted to the plaintiffs.

APPENDIX C

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

December 17, 1986

William LOWARY, et al., Plaintiffs,

v.

LEXINGTON LOCAL BOARD OF EDUCATION, et al., Defendants.

No. C86-1536A.

United States District Court,
N.D. Ohio, E.D.

Dec. 17, 1986.

MEMORANDUM OPINION

DOWD, District Judge.

Before the Court is the motion of the plaintiffs, William Lowary and Sara Wyatt, for a preliminary injunction enjoining the collection and distribution of union dues. The defendants, the Lexington Local Board of Education, the members and officers of the Board of Education, the Lexington Teachers Association (LTA), and the Ohio Education Association (OEA), have responded to and oppose the plaintiffs' request for injunctive relief. The Court conducted a hearing on the plaintiffs' motion on December 1, 1986 and provided the parties an opportunity to file post-hearing briefs. For the reasons that follow, the Court grants the plaintiffs' motion for preliminary injunction unless and until the Lexington Board of Education agrees to create an interest-bearing escrow account for the deposit of the plaintiffs' fair-share fees subject to the conditions hereinafter set forth.

I.

The plaintiffs are teachers in the Lexington Local School System and are employed by the Lexington Local Board of Education. The LTA is the exclusive bargaining representative for all teachers employed by the Board and negotiates the

employment contract with the Board on behalf of all teachers in the Lexington Local School District. The plaintiffs are not members of the LTA or the OEA. In their complaint, the plaintiffs request the Court to declare that § 4117.09(C) of the Ohio Revised Code, which authorizes employers and unions to include an agency shop provision in the collective bargaining agreement, is unconstitutional, and to find that the fair-share provisions of the collective bargaining agreement between the LTA and the Lexington Local School Board violate the constitutional rights of the plaintiffs as protected by 42 U.S.C. § 1983.

The plaintiffs have requested the Court to issue an injunction preventing

> the unions and the School Board from collecting any agency fees from plaintiffs until this Court rules on the merits of this case, and
> . . .the unions and the School Board from enforcing Article IV of the collective bargaining agreement (the agency fee clause) against plaintiffs, until this Court rules on the merits of this case.

II.

At the hearing, plaintiff Lowary testified that he is a geography teacher in the Lexington Local School System and is not a member of any teachers union organization. He testified that on November 14, 1986, the School Board deducted automatically $29.65 from his paycheck, an amount equal to the union dues paid by LTA members. Plaintiff Lowary has objected to the deduction of union dues from his paycheck by writing letters to President of the Board of Education and the President of the LTA. Lowary testified that he did not authorize a deduction of dues, although he did sign his teaching contract, which incorporates the provisions of the collective bargaining agreement. Plaintiff Lowary testified that he had not received a copy of the rebate procedure contained in the most recently agreed upon collective bargaining agreement, and that he did not receive notice that a rebate procedure exists. The only information

received by Lowary relating to the financial affairs of the LTA consisted of his pay stub indicating a deduction of $29.65 deducted from his paycheck; a flyer from the LTA describing in general terms the use to which the OEA and LTA put collected union dues; a copy of the minutes of the LTA executive committee meeting describing the dollar breakdown of the total $296.50 dues; and a computerized OEA membership form authorizing a deduction for dues. The plaintiff did know, however, that money would be deducted from his paycheck as a fair-share fee.

Plaintiff Wyatt did not testify due to time restraints imposed on the hearing by the Court. Counsel for the plaintiff indicated, however, that she would have testified to facts identical to those to which plaintiff Lowary testified.

Jon Ziegler, the general counsel for defendant OEA, testified on behalf of the union defendants. Ziegler described the rebate procedure contained in the current collective bargaining agreement. He indicated that the nonunion teachers required to pay fair-share fees would receive financial information relating to the rebate procedure sometime during the week of December 8. Ziegler testified that the fair-share payers, identified by enrollment membership records, would receive the following: the 1986-87 budget for the OEA, the LTA, the National Education Association (NEA), and the North Central Ohio Education Association; the audited financial records of the national and state associations; financial information consisting of cash receipts and disbursements for the local associations; a copy of the rebate procedure currently incorporated into the collective bargaining agreement; and a summary of the amounts of the fair-share deduction and a step-by-step instruction on how fee payers may protect their rights under the rebate procedure. Ziegler verified that $29.65 in dues had been deducted on the plaintiffs' paychecks prior to the issuance of the temporary restraining order. Ziegler estimated that the chargeable expenses for the NEA were approximately 95% and that the chargeable expenses for the local associations were approximately 75%. A chargeable expense is one that relates to the negotiation and implementation of the collective bargaining agreement. Ziegler also testified that none

of the money obtained through the collection of dues and fair-share fees went to support political contributions, because all political contributions are made through the union's political action committee.

III.

Under applicable Sixth Circuit precedent, a court must consider four factors in determining whether it should grant an injunction:

1) Whether the plaintiffs have shown a strong or substantial likelihood or probability of success on the merits;
2) Whether the plaintiffs have shown irreparable injury;
3) Whether the issuance of a preliminary injunction would cause substantial harm to others;
4) Whether the public interest would be served by issuing a preliminary injunction.

Mason County Medical Association v. Knebel, 563 F.2d 256, 261 (6th Cir. 1977). The Court may not weigh mechanically the four factors set out in *Mason County*. No single factor is determinative, and the Court should weigh each of the factors in light of the factual circumstances of the case. *See Roth v. Bank of the Commonwealth*, 583 F.2d 527, 537-38 (6th Cir. 1978), *cert. granted*, 440 U.S. 944, *cert. dismissed*, 442 U.S. 925 (1979). In *Roth*, the Sixth Circuit held that where a plaintiff makes a strong showing of irreparable harm, the injunction may issue on a lesser showing of a likelihood of prevailing on the merits. *Id.* In a case involving great irreparable harm, then, an injunction could issue on a showing that the plaintiff has raised questions that are "fair ground for litigation." *Id.* at 537; *see Brandeis Machinery & Supply Corp. v. Barber-Greene Company*, 503 F.2d 503, 505 (6th Cir. 1974). It follows that the showing of a strong likelihood of prevailing on the merits will enable a court to issue an injunction despite a lesser showing of irreparable harm. *See Roth*, 583 F.2d at 537-38 (quoting *Metropolitan Detroit Plumbing & Mechanical Contractors Association v. HEW*, 418 F. Supp. 585, 586 (E.D. Mich. 1976). A consideration of each of the *Mason County* factors follows.

A. *Likelihood of Success on the Merits.*

The Supreme Court, in *Abood v. Detroit Board of Education*, 436 U.S. 209 (1976), upheld the constitutionality of a collective bargaining agreement between an authorized bargaining representative for governmental employees and the public employer despite the inclusion of an agency shop provision in the agreement requiring non-union members to contribute service charges used for collective bargaining, contract administration, and grievance adjustment expenses. *Id.* at 232. The Court cautioned, however, that the first amendment prohibits the union from using any portion of the agency fee collected from a non-union member to support political views or ideological causes unrelated to the union's duties as the collective bargaining representative. *Id.* at 235. The Court sought to eliminate the "free rider" problem, in which the non-union member enjoys the benefits gained as an employee represented by the union without contributing to the union, and also to prevent the non-union members from supporting unwillingly political and ideological causes in which the non-union member does not believe.

In *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986), the Supreme Court addressed the question of what procedures are necessary to prevent the compulsory subsidization of political and ideological causes through the payment of fair share fees by employees who do not support those causes. The Court held that any fair-share fee payment system must include a rebate procedure, and that the rebate procedure must include three procedural safeguards to protect the first amendment rights of non-union members. First, the rebate scheme must ensure that dissenters' funds are not used, even temporarily, to support unrelated activities; "[a] forced extraction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the nonunion employees' objections." *Id.* at 1075. Second, the employee must receive adequate information about the basis of the proportionate fee, because "[l]eaving the nonunion employees in the dark about the source of the figure for the agency fee . . . does not adequately protect the careful distinctions drawn in *Abood*." *Id.* at 1076. Third, the rebate

scheme must "provide for a reasonably prompt decision by an impartial decisionmaker . . . [because] the nonunion employee . . . is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.*

Plaintiff Lowary testified that he received no notice of the new rebate procedure, of how the new rebate procedure works, or of how he can object to the deduction of fair-share fees and preserve his rights to a rebate. Ziegler also testified that the unions had not yet provided the fair-share payers with information regarding the rebate procedure. Based on the testimony at the hearing, it is clear that the plaintiffs received no notice of the rebate procedure. Although the plaintiffs have received information regarding the amount of the fee, and a breakdown of where the money is distributed, the plaintiffs have not received sufficient information to allow them to object to the amount of the deduction in an informed manner. Based on the testimony at the hearing, the Court finds that there is a strong likelihood that the plaintiff will succeed on the merits with respect to the lack of advance notice of the rebate procedure. The Court concludes it is premature to address the merits of the unions' rebate procedures.

B. *Irreparable Harm.*

The defendant unions' failure to comply even minimally with the notice procedural safeguard outlined in Hudson makes it appear likely that the unions will be found to have violated the plaintiffs' first amendment rights. The constitutional right involved is the right of the individual not to support unwillingly political or ideological causes through forced subsidization of expenses unrelated to the collective bargaining agreement. See *Hudson*, 106 S.Ct. at 1073 n.9. The defendants' failure to provide adequate notice to the plaintiffs increases the likelihood that plaintiffs will not be able to object in a knowing and timely fashion. Accordingly, the Court finds a likelihood of irreparable harm.

C. *Harm to Others.*

Neither the union defendants or the Board produced evidence regarding the harm they will suffer should the Court issue the injunction. The school board argued, however, that confusion and uncertainty among school boards will occur should the injunction issue. The Court is not convinced that the speculative harm cited by the Board outweighs the harm to the first amendment rights of the plaintiffs. The Court notes that the broad injunction requested by the plaintiffs, however, places in jeopardy the ability of the unions to collect the fair-share amounts the plaintiffs are constitutionally obligated to pay. Thus the Court finds significant harm to the union might result from the issuance of the injunction.

D. *Balancing.*

The Court is aware of the tension between the legitimate needs of unions to receive financial support from all members of the bargaining unit who benefit from the union's representation, the "free rider" problem, and the need to protect the first amendment associational and expression rights of non-union members by preventing forced subsidization of political and ideological activities unrelated to the administrative and negotiation aspects of the collective bargaining agreement. In fashioning the appropriate preliminary injunctive remedy, the Court is aware of the prospect that this dispute might continue for months or even years. Accordingly, the Court will allow the Lexington Local Board of Education to resume deducting the fair-share fee directly from the plaintiffs' paychecks following the certification by the Lexington Local Board of Education to this Court that it will direct its fiscal officer to immediately place in an interest-bearing escrow account the entire amount of the plaintiffs' withheld fair-share fees with the accompanying instruction to the fiscal officer that he is not to disburse the funds from the interest-bearing escrow account until further order of this Court.

This injunction, limited by these conditions, is an interim step designed to maintain the status quo until the Court has an

opportunity to review the constitutionality of the Ohio statutory scheme, as well as the constitutionality of the rebate procedure recently incorporated into the collective bargaining agreement between the two defendants.

The evidence presented at the hearing addressed the admitted failure by the school board and the union to inform plaintiffs and other non-union members of the LTA similarly situated, of the existence and substance of the recently adopted rebate procedure. The plaintiff introduced no evidence regarding the constitutionality of the proposed procedure, and the Court believes that an examination of the merits of the procedure at this time, prior to the completion of discovery, is inappropriate.

E. *Public Interest.*

The Court finds a public interest in requiring the union and the Board to comply with the *Hudson* notice requirements, designed to protect first amendment rights, prior to deducting fair-share fees from the plaintiffs' paychecks. The Court recognizes, however, that the union defendants also have the right to receive fair-share payments from non-union members. Thus there is a public interest in preventing the judicially recognized unfairness of the "free riders" situation. Thus, the Court finds a significant public interest in the accommodation of the interests of both the plaintiffs and the defendants until the Court can resolve the constitutional issues.

IV. CONCLUSION

For the foregoing reasons, the Court will publish an order enjoining the Lexington Local Board of Education from deducting the fair-share fee from the plaintiffs until the Lexington Local Board of Education certifies in writing to the Court that it will direct and require its fiscal officer to immediately place the entire fair-share fee deducted from the plaintiffs into an interest-bearing escrow account with instructions to its fiscal officer not to

distribute the withheld fair-share fees of the plaintiffs until further order of this Court.

IT IS SO ORDERED.

Preliminary Injunction

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Preliminary Injunction, the Court hereby enjoins the Lexington Local Board of Education from deducting the fair-share fee from the plaintiffs until the Lexington Local Board of Education certifies in writing to the Court that it will direct and require its fiscal officer to immediately place the entire fair-share fee deducted from the plaintiffs into an interest-bearing escrow account with instructions to its fiscal officer not to distribute the withheld fair-share fees of the plaintiffs until further order of this Court.

The temporary restraining order previously issued is hereby dissolved in favor of the preliminary injunction herein issued.

This order shall become effective upon the posting of bond by the plaintiffs in the sum of One Hundred Dollars ($100.00).

APPENDIX D

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

October 21, 1987

William LOWARY, et al., Plaintiffs,

v.

LEXINGTON LOCAL BOARD OF EDUCATION, et al., Defendants.

No. C86-1536A.

United States District Court,
N.D. Ohio, E.D.

Oct. 21, 1987.

MEMORANDUM OPINION

DOWD, District Judge.

I. INTRODUCTION

The plaintiffs, William Lowary and Sara Wyatt, have brought this action under 42 U.S.C. § 1983 against defendants Lexington Local Board of Education and its members and officers, Robert Whitney, Mark Plotnick, Susan Umbarger, James Bollinger, Rick Bell, Helen Gilroy, the Lexington Teachers Association, and the Ohio Education Association. In their complaint, the plaintiffs allege that fair-share provisions of the collective bargaining agreement between the Lexington Teachers Association (LTA) and the Lexington Local Board of Education violates the constitutional rights of the plaintiffs as protected by the first and fourteenth amendments. The plaintiffs also allege that § 4117.09(C) of the Ohio Revised Code, which authorizes employers and unions to include an agency shop provision in the collective bargaining agreement, is unconstitutional. The State of Ohio, through Attorney General Anthony J. Celebrezze, Jr., has intervened to defend the constitutionality of the statute.

The parties have stipulated the following facts to the Court, which constitutes all the facts necessary for the Court to decide the issues in this case.

II. JOINT STIPULATIONS OF FACT.[1]

A. *The 1984-85 School Year.*

1. William Lowary and Sara Wyatt were employed as teachers by the Lexington Local Board of Education ("School Board").

2. The School Board, pursuant to O.R.C. § 4117.04, had recognized the Lexington Teachers Association (LTA) as the exclusive collective bargaining representative of all teachers in the school district.

3. The LTA was affiliated with the Ohio Edison Association (OEA), the National Education Association (NEA) and the North Central Ohio Education Association (NCOEA).

4. Plaintiffs were not members of the Lexington Teachers Association or any of its affiliates.

5. Beginning with the 1984-85 school year, the School Board and the LTA agreed to a "fair share fee" clause in their collective bargaining agreement. That clause stated:

ITEM 10—*Fair Share Fee*:

1. The fair share fee shall be an exclusive right conferred upon the Lexington Teachers' Association, as

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[1]The parties submitted a joint stipulation of facts to the Court on July 28, 1987. The Court has adopted the stipulation and reproduced it below as presented by the parties. The Court has made minor changes primarily in explaining references to certain documents.

the exclusive bargaining agent. Each bargaining unit employee, upon employment and re-employment, shall annually either:

a. Sign and deliver to the Association an application for Association membership and, unless the annual dues are paid by cash, check, money order, or other approved method, sign and deliver to the Association an authorization to the Treasurer for payroll deduction of membership dues. The Treasurer, upon written notice from the president of the Association that a member has terminated membership, shall forthwith commence the check-off of the representation fee and assessments with respect to the former member and the amount of the fee for the remainder of the school year shall be the annual representation fee and uniformly applied assessments less the amount of Association annual dues or previously paid through payroll deduction, or;

b. In lieu of becoming a member of the Association, authorize the Treasurer to check off from the wages of the employee and pay to the Association an annual fair share fee equivalent to the total annual dues and uniformly applied assessments of the United Teaching Profession. All contracts of employment for positions in the bargaining unit shall contain the following language:
"This Contract of employment is subject to the Master Contract between the Lexington Board of Education and the Lexington Teachers' Association, the terms and conditions of which are incorporated herein by reference as through [sic] fully rewritten herein. By signing this Contract, I represent that I have been notified of the fair share fee provisions contained in the Master Contract, that I will, if I elect not to become, or remain, a member of the Association, pay to the Association the prescribed annual fees and uniformly applied assessments for service and benefits to be conferred upon me

by the Association as my exclusive bargaining agent during the terms of my employment by the Board."

2. The president of the Association shall by July 1 annually certify to the Treasurer of the Board of Education the amount of the annual fair share fee and uniformly applied assessments for the ensuing school year. The Treasurer, upon receipt of the certification of the amount of the fees and assessments shall, on the basis of the documents referred to in paragraphs (a) and (b) of Section 1 above, deduct the dues of Association members pursuant to the payroll deduction authorization and deduct the fees and assessments to the Association. The deductions shall be in equal amounts beginning with the first pay in November and continuing for a total of ten (10) consecutive pay periods. The failure or refusal of the Treasurer to deduct the fair share fee, due to court order or otherwise, shall not relieve the employee of his/her liability to the Association for the amount of the fair share fees and assessments.

3. Implementation

Upon the effective date of this Agreement, the Board and Association shall jointly notify in writing, each employee in the bargaining unit of this fair share fee agreement. Such notice shall have attached thereto a copy of the exact language of this Agreement. Any non-member of the Association who elects to continue employment with the Board after the thirty (30) day period shall be deemed to have consented to receive the services and benefits to be conferred by the Association as the exclusive bargaining agent and shall be liable to the Association for the annual fair share fee and uniformly applied assessments, which, during the first school year of this Agreement only, shall be pro-rated on a monthly basis. The provisions of this section shall be in accordance with the appropriate part(s) of the

public employee Collective Bargaining law of the State of Ohio.

6. At the commencement of the 1984-85 school year, copies of the collective bargaining agreement, containing the above-quoted language, were distributed to all teachers, including plaintiffs, by the School Board. Plaintiffs were therefore aware of the terms of the collective bargaining agreement.

7. On or about June 15, 1984, the LTA, pursuant to the terms of the fair share fee clause in the collective bargaining agreement, notified School Board Treasurer Helen Gilroy that the union dues and fair share fee amount owed from each teacher in the bargaining unit for the 1984-85 school year was $252.50.

8. The fair share fee of $252.50 for the 1984-85 year was equal to the amount of dues paid by voluntary members of the "United Teaching Professions," which includes the LTA, OEA, NEA and NCOEA. Plaintiffs were aware that the amount of the fair share fee had been set at $252.50 before any of it was deducted from their pay.

9. According to the OEA Constitution, the amount of dues paid by voluntary members of the OEA is calculated as ".0076 per dollar of the average salary for elementary and secondary public school classroom teachers in Ohio for the previous year rounded to the nearest dollar and an additional service fee of $12.50 to be allocated to the support of the UniServ Delivery System." The amount of dues paid by members of affiliated unions, the LTA, NEA and NCOEA, is set by each respective union. The total amount of dues for members of all affiliates for 1984-85 was $252.50.

The School Board had no input into the amounts the respective unions set as annual dues for voluntary members.

10. Prior to the November, 1984 collection of the fair share fee, in approximately September, 1984, LTA provided plaintiffs

with documents entitled "NEA 1983-84 Expenditures By Service Areas" and "OEA 1983-84 Expenditures By Service Areas."[2] The School Board did not ask, nor was it provided by the unions, with financial information regarding the calculation of the fair share fee, prior to the commencement of the deductions. Nothing in the collective bargaining agreement provided for the School Board to perform or obtain independent audits of the finances of the unions.

11. On or about September 19, 1984, plaintiffs wrote to the LTA the letters objecting to the use of dues for purposes other than paying for the costs of negotiating, administering, and processing grievances under the collective bargaining agreement.[3] Plaintiffs did not notify the School Board of their

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[2]The documents represent an itemized breakdown of a union member's dues by service areas including: uniserve staff program; general field assistance; collective bargaining support; instruction and professional development programs; legal defense; internal communications and external public relations; legislative efforts; human and civil resources; training of elected leaders and staff; political action; advocate research; contingency and financial reserve; organizational maintenance; governance; and data processing.

[3]Both letters are addressed to Mrs. Mary Bell, President Lexington Teachers Association and signed by the plaintiffs. The substance of the letters, in full, is as follows:

Dear Mrs. Bell:

You are hereby formally notified of my objection under the First and Fourteenth Amendments to the United States Constitution to the deduction, retention even temporarily, and expenditure of dues/fees from my paycheck for any purposes other than paying the costs of:

(1) negotiating collective bargaining agreements with my employer;

(2) administering collective bargaining agreements with my employer; and

(3) processing grievances at my request with my employer.

It is my belief that my dues/fees will be used for other than these three enumerated purposes, including but not limited to political, ideological, social, economic, and/or philosophic purposes or activities of all kinds or nature. I specifically protest and object to the use of my dues/fees for all such non-collective bargaining activities.

objections to the deduction of fair share fees from their salaries, nor did they request that the Board assist them in any way in their objections or appeals to the union.

12. On or about September 27, 1984, the LTA responded to the plaintiffs' objections by letter, stating that:

> In response to your letter dated September 19, 1984, it is the position of the Lexington Teachers Association, NCOEA/OEA/NEA that the dues amount do specifically go towards negotiating and administering the negotiated agreement between the LTA and the Lexington Local Board of Education.
>
> If you wish to file an objection based on the provisions specified in the Ohio Revised Code Section 4117.09(C), I have enclosed a copy of the procedure for filing such objection.

Enclosed with the letter was a copy of the Ohio Education Association's Rebate Procedure (Appendix 1) which had been adopted in March, 1983 and which applied during the 1984-85 school year.

13. The plaintiffs and the unions did not correspond further during the 1984-85 school year.

Therefore, as is my right under the recent Supreme Court decision in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977), I hereby demand that the amount of my dues/fees be immediately reduced to an amount representing only the pro rata amount necessary for collective bargaining, contract administration and grievance adjustment with my employer.

Please have the courtesy to promptly reply to this letter.

14. The LTA has not established or maintained any rebate procedures of its own. The LTA followed the rebate procedure established by OEA.

15. The School Board did not establish or maintain any rebate procedures of its own.

16. The School Board has no input into the dollar amount of the fair share fee charged to nonmembers of the respective unions, according to the terms of the collective bargaining agreement. The School Board did not inquire, and was not advised by the unions, how the amount of the fair share fee was calculated. The School Board had no control over the dollar amount of annual dues which the respective unions charged union members, or the dollar amount charged to fair share fee payers, according to the terms of the collective bargaining agreement.

17. On or about October 31, 1984, the plaintiffs filed unfair labor practice charges against LTA with the Ohio State Employment Relations Board concerning the collection and use of their fair share fee money. On or about February 15, 1985, those charges were dismissed by SERB based upon a related decision in *Bowles v. AFSCME*, Case No. 84-UU-04-0783.

18. Beginning on or about November 9, 1984, and continuing for the next 9 bi-weekly pay-periods, the School Board deducted a fair share fee of $25.25 from each plaintiff for each pay period. Thus, by approximately March 16, 1985, the School Board had deducted $252.50 in fair share fees from each plaintiff.

19. The fair share fee money collected by the School Board was turned over periodically to the LTA. The LTA, in turn, sent all of the agency fees to the Ohio Education Association on a monthly basis, with the exception of $10.00 for LTA local dues. The OEA, in turn, sent some of the money to NEA and some to NCOEA.

20. The fair share fee money deducted from plaintiffs was never placed into any escrow account by any of the defendants or the non-party LTA affiliates.

21. Because plaintiffs did not respond to the September 27, 1984 letter from LTA, defendant unions did not consider the plaintiffs to have properly objected according to its Rebate Procedure. For this reason, neither William Lowary or Sara Wyatt received a refund or rebate of any of their fair share fee money for the 1984-85 school year

22. Pursuant to its rebate procedure (Appendix 1), the OEA selected Eric Schmertz to serve as its "fee umpire" to determine a rebateable amount for the 1984-85 school year. Subject only to the requirement in its rebate procedure that the fee umpire "be a member of the National Academy of Arbitrators who has experience in public sector labor relations," the OEA had unrestricted choice over the selection of Mr. Schmertz to serve as "fee umpire." No agency fee payer had the right to choose his own "umpire" or veto the election of Mr. Schmertz.

23. Mr. Schmertz reviewed the OEA's expenditures and programs and met with OEA officials and staff to determine a "rebateable" amount of the fair share fee, but no agency fee payers were informed of these meetings or allowed to participate in these meetings.

24. Mr. Schmertz was paid a fee plus expenses by OEA to serve as "umpire."

25. On approximately January 7, 1986, Mr. Schmertz issued a ruling.

B. *The 1985-1986 School Year.*

26. William Lowary and Sara Wyatt were employed as teachers by the Lexington Local Board of Education (School Board).

27. The School Board, pursuant to O.R.C. § 4117.04, had recognized the LTA as the exclusive collective bargaining representatives of all teachers in the school district.

28. The Lexington Teachers Association (LTA) was affiliated with the Ohio Education Association (OEA), the National Education Association (NEA) and the North Central Ohio Education Association (NCOEA).

29. Lowary and Wyatt were not members of the LTA or any of its affiliates.

30. For the 1985-86 school year, the School Board and the LTA agreed in their collective bargaining agreement to a fair share clause as stated in ¶ 5, *supra*.

31. On or about June 27, 1985, the LTA, pursuant to the terms of the fair share fee clause in the collective bargaining agreement, notified School Board Treasurer Helen Gilroy that the union dues and fair share fee amount owed from each teacher in the bargaining unit for the 1985-86 school year was $277.50.

32. The fair share fee amount of $277.50 for the 1985-86 year was equal to the amount of dues paid by voluntary members of the "United Teaching Professions," which includes the LTA, 0EA, NEA, and NCOEA. Plaintiffs were aware that the amount of the fair share fee had been set at $277.50 before any of it was deducted from their pay.

33. According to the OEA Constitution, the amount of dues paid by voluntary members of the OEA is calculated as ".0076 per dollar of the average salary for elementary and secondary public school classroom teachers in Ohio for the previous year rounded to the nearest dollar and an additional service fee of $12.50 go be allocated to the support of the UniServ Delivery System." The amount of dues paid by members of affiliated unions, the LTA, NEA and NCOEA is set by each respective

union. The total amount of dues for members of all affiliates for 1985-86 was $277.50.

The School Board had no input into the amounts the respective unions set as annual dues for voluntary members.

34. In approximately September, 1985, LTA provided plaintiffs with documents entitled "NEA 1984-85 Expenditures by Service Areas" and "OEA 1984-85 Expenditures by Service Areas." Plaintiffs were aware that the collective bargaining agreement contained a fair share fee provision, and that the deductions the prior year began in November and lasted through 10 bi-weekly pay periods. The School Board did not ask, nor was it provided by the unions, with financial information regarding the calculation of the fair share fee, prior to the commencement of the deductions. Nothing in the collective bargaining agreement provided for the School Board to perform or obtain independent audits of the finances of the unions.

35. On or about September 23, 1985, plaintiff Lowary wrote an objection letter to the LTA.[4] Lowary delivered a copy of his objection letter to Dr. Klenke, School Superintendent, but had no expectation that Dr. Klenke would take any action in connection therewith. Plaintiff Wyatt wrote no objection letter during the 1985-86 year, and received only the "Expenditure" sheets which she received in September, 1985.

36. The OEA had established a fair share fee rebate procedure (Appendix 1) which applied during the 1985-86 school year.

37. The LTA did not establish or maintain any rebate procedure of its own. The LTA followed the rebate procedure established by OEA.

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[4]The letter is substantively identical to the letter identified in footnote 2, *supra*.

38. The School Board did not establish or maintain any rebate procedures of its own.

39. The School Board had no input into the dollar amount of the fair share fee charged to nonmembers of the respective unions, according to the terms of the collective bargaining agreement. The School Board did not inquire, and was not advised by the unions, how the amount of the fair share fee was calculated. The School Board had no control over the dollar amount of annual dues which the respective unions charged union members, or the dollar amount charged to fair share fee payers, according to the terms of the collective bargaining agreement.

40. Beginning on or about November 8, 1985, and continuing for the next 9 bi-weekly pay-periods, the School Board deducted a fair share fee of $27.75 from each plaintiff for each pay period. Thus, by approximately March 15, 1986, the School Board had deducted $277.50 in fair share fees from each plaintiff.

41. The plaintiffs' fair share fee money was turned over immediately to the LTA by the School Board, neither of whom placed the money into an escrow account. The LTA, in turn, sent all of the fair share fees to the Ohio Education Association on a monthly basis, with the exception of $10.00 for LTA local dues. The OEA, in turn, sent some of the money to NEA and some to NCOEA.

42. The fair share fee money deducted from plaintiff Wyatt was never placed in any escrow account by the School Board. It was not placed into escrow by the union defendants or the nonparty LTA affiliates because they did not consider Wyatt to have objected.

43. OEA placed in an escrow account a total of $30.40 of Mr. Lowary's fair share fees during the course of the 1985-86 year. This amount of $30.40 was calculated by taking the prior years' (1984-85) rebate determination made by OEA "fee umpire"

Eric Schmertz and adding 5% to that figure. The remainder of plaintiff Lowary's fair share fees were distributed by OEA among the NEA, NCOEA and OEA.

44. On or about January 21, 1986 Mr. Lowary received from OEA an acknowledgement of plaintiff Lowary's objection along with a copy of the 1985-86 OEA Budget.

45. On or about December 22, 1986, plaintiff Lowary received a check for $21.39 from the OEA, as a rebate for the 1985-86 year, along with an explanation of how the rebate was calculated. Mr. Wyatt did not receive either a rebate check or any of the information sent to Mr. Lowary on December 22, 1986 because the defendant unions did not consider Mrs. Wyatt to have objected.

46. OEA made the rebate determination of $21.39 based upon its own review of its 1985-86 expenditures.

47. In approximately August, 1986, the OEA adopted a new rebate procedure attached hereto as (Appendix 2). Before and thereafter, OEA representatives met with representatives of the State Employment Relations Board to determine whether the Board would serve as the impartial decisionmaker in the OEA's new procedure. The OEA believed the Board would so serve. However, in early 1987, a question arose about the Board's availability to serve in that role. OEA then chose to have the American Arbitration Association act pursuant to its Rules for Impartial Determination of Union Fees.

48. On approximately May 15, 1987, Mr. Lowary received the letter from the OEA regarding the use of the American Arbitration Association.

49. To date, i.e., July 28, 1987, the day the stipulated facts were filed with the Court, no notice of an American Arbitration Association hearing has been sent, and no hearing has occurred. If called to testify, a representative of AAA would state that

arbitrator Marlin Volz has been selected by AAA pursuant to its Rules for the impartial Determination of Union Fees.

C. *The 1986-87 School Year.*

50. William Lowary and Sara Wyatt (plaintiffs) were employed as teachers by the Lexington Local Board of Education (School Board).

51. The School Board, pursuant to O.R.C. § 4117.04 has recognized the Lexington Teachers Association (LTA) as the exclusive collective bargaining representative of all teachers in the school district.

52. The Lexington Teachers Association (LTA) was and is affiliated with the Ohio Education Association (OEA), the National Education Association (NEA) and the North Central Ohio Education Association (NCOEA).

53. Plaintiffs are not members of the LTA or any of its affiliates.

54. In the current collective bargaining agreement between the LTA and the School Board (effective 9/1/86 through 12/31/88), the School Board and LTA have agreed to a fair share fee clause. That clause states:

ARTICLE IV

FAIR SHARE FEE

The fair share fee shall be an exclusive right conferred upon the Association, as the exclusive bargaining agent. Each teacher upon employment and re-employment, shall annually either:

A. Sign and deliver to the Association an application for Association membership and, unless the annual dues are paid by cash, check, money order, or other approved

method, sign and deliver to the Association an authorization to the treasurer for payroll deduction of membership dues. The Treasurer, upon written notice from the President of the Association that a member has terminated membership, shall forthwith commence the check off of the representation fee and assessments with respect to the former member and the amount of the fee for the remainder of the school year shall be the annual representation fee and uniformly applied assessments less the amount of Association annual dues or previously paid through payroll deduction, or;

B. In lieu of becoming a member of the Association, authorize the Treasurer to check off from the wages of the employee and pay to the Association an annual fair share fee equivalent to the total annual dues and uniformly applied assessments of the United Teaching Profession. All contracts of employment for positions in the bargaining unit shall contain the following language:

"This Contract of employment is subject to the Negotiated Agreement between the Lexington Board of Education and the Lexington Teachers' Association, the terms and conditions of which are incorporated herein by reference as though fully rewritten herein. By signing this Contract, I represent that I have been notified of the fair share fee provisions contained in the Negotiated Agreement, that I will, if I elect not to become, or remain, a member of the Association, pay to the Association the prescribed annual fees and uniformly applied assessments for service and benefits to be conferred upon me by the Association as my exclusive bargaining agent during the terms of my employment by the Board."

C. The President of the Association shall, by July 1, annually certify to the Treasurer of the Board the amount of the annual fair share fee and uniformly

applied assessments for the ensuing school year. The Treasurer, upon receipt of the certification of the amount of the fees and assessments shall, on the basis of the documents referred to in paragraphs (a) and (b) of Section 1 above, deduct the dues of Association members pursuant to the payroll deduction authorization and deduct the fees and assessments from the pay of every non-member employed in the bargaining unit and pay such dues, fees and assessments to the Association. The deductions shall be in equal amounts beginning with the first pay in November and continuing for a total of ten (10) consecutive pay periods. The failure or refusal of the Treasurer to deduct the fair share fee, due to court order or otherwise, shall not relieve the teacher of his/her liability to the Association for the amount of the fair share fees and assessments.

The Association agrees to indemnify and save the Board harmless against claims and suits that may arise out of or by reason of action taken by the Board in compliance with this article, provided that:

A. The Board shall give a ten (10) day written notice of any claim made or action filed against the Board for which indemnification may be claimed;

B. The Association shall reserve the right to designate counsel to represent and defend the Board;

C. The Board agrees to (1) give full and complete cooperation and assistance to the Association and its counsel at all levels of the proceeding, (2) permit the Association or its affiliates to intervene as a party if it so desires, and/or (3) to not oppose the Association or its affiliates' application to file briefs amicus curiae in the action;

D. The action brought against the Board must be a direct consequence of the Board's good faith compliance with this article; however, there shall be no indemnification of the Board if the Board intentionally or willfully fails to apply (except due to court order) or misapplies such fair share fee provision herein.

This indemnification shall not apply to any claims or suits filed prior to the effective date of this agreement.

55. Copies of the collective bargaining agreement effective September, 1986 through December, 1988, containing the above-quoted language, were distributed to all teachers, including plaintiffs, at the commencement of the 1986-1987 school year. Plaintiff William Lowary, on April 21, 1986, had entered into a 3-year limited teacher's contract with the School Board, which contract contained the language set forth in Article IV § B above. At the commencement of 1986-1987 school year, plaintiffs Lowary and Wyatt were provided with LTA enrollment forms setting forth the amount of annual dues for the United Teaching Professions in the amount of $296.50. Plaintiffs returned these forms unsigned. Copies of the completed forms indicating which teachers were union members or fee payers were forwarded by the LTA to the School Board between September 30, 1986 and November 1, 1986.

56. The amount of $296.50 for the 1986-87 year was equal to the amount of dues paid by voluntary members of the United Teaching Professions, which includes the LTA, OEA, NEA and NCOEA. Plaintiffs were aware that the amount of the fair share fee had been set at $296.50 before any of it was deducted from their pay.

57. According to the 0EA Constitution, the amount of dues paid by voluntary members of the OEA is calculated as ".0076 per dollar of the average salary for elementary and secondary public school classroom teachers in Ohio for the previous year rounded to the nearest dollar and an additional service fee of

$12.50 to be allocated to the support of the Uniserv Delivery System." The amount of dues paid by members of affiliated unions, the LTA, NEA and NCOEA is set by each respective union. The total amount of dues for members of all affiliates for 1986-87 was $296.50.

The School Board has no input into the amounts the respective unions set as annual dues for voluntary members.

58. In approximately September, 1986, LTA provided plaintiffs with documents entitled "NEA 1985-86 Expenditures by Service Areas," "OEA 1985-86 Expenditures by Service Areas" and the August 18, 1986 minutes of an LTA Executive Committee meeting. Plaintiffs were aware of the terms of the collective bargaining agreement and were aware that deductions would occur pursuant to the terms of the collective bargaining agreement.

59. In approximately August, 1986, the OEA adopted a new rebate plan (Appendix 2), which applies to agency fees collected from objectors during the 1986-87 school year. The OEA has determined that the impartial decisionmaker provisions of that rebate plan apply to the fair share fees collected during the 1985-86 school year. In adopting the new rebate procedure (Appendix 2), OEA relied upon the advice of its General Counsel, Jon Ziegler. He advised OEA that the new procedure complied with the *Hudson* decision and other applicable federal law. Pursuant to a Request for Production of Documents pursuant to F.R.Civ.P. 34, the defendant unions provided a copy of this rebate plan to plaintiffs' counsel in approximately September, 1986.

60. On or about September 26, 1986 plaintiffs Lowary and Wyatt wrote to the LTA and the School Board the letters stating that:

> This is to inform you that I object to supporting any non-collective bargaining activities of the Lexington Teachers Association and its affiliates. I object to the

collection of any agency fees from my salary until the procedures mandated by the United States Supreme Court in the *Hudson* case are met.

61. The LTA has not established or maintained any rebate procedures of its own. The LTA followed the rebate procedure established by OEA.

62. The School Board has not established or maintained any rebate procedures of its own.

63. The School Board had no input into the dollar amount of the fair share fee charged to nonmembers of the respective unions, according to the terms of the collective bargaining agreement. The School Board did not inquire, and was not advised by the unions, how the amount of the fair share fee was calculated. The School Board had no control over the dollar amount of annual dues which the respective unions charged union members, or the dollar amount charged to fair share fee payers, according to the terms of the collective bargaining agreement.

64. On November 14, 1986, the School Board deducted a fair share fee of $29.65 from each plaintiff. This fee deduction was equal to the amount that voluntary union members were required to pay to the LTA and its affiliates.

65. No fair share fees were deducted from plaintiffs' salaries on November 28, 1986 or December 12, 1986, pursuant to the Court's Temporary Restraining Order.

66. The fair share fee money deducted from plaintiffs on Nov. 14, 1986, was turned over to the LTA by the School Board. Neither the School Board nor the LTA placed any of that money into an escrow account.

67. On or about Dec. 16, 1986, the LTA turned plaintiffs' Nov. 14, 1986 agency fee payment, along with the other union dues and fair share fees collected from the bargaining unit

employees, over to the OEA. On or about Jan. 9, 1987, plaintiffs sent letters to the OEA objecting to the collection of fees for impermissible purposes.[5] On Jan. 23, 1987, OEA placed into an interest bearing escrow account, on behalf of William Lowary and Sara Wyatt, $296.50 respectively.

68. On December 17, 1986, the court issued a preliminary injunction enjoining the School Board from deducting additional fair share fees until such time as the School Board certified in writing that it would place such fair share fees in an escrow account and not distribute such fees until further order of the court. On December 22, 1986, the School Board certified to the court that an escrow account had been established. Beginning on December 23, 1986, and continuing for a period of approximately six weeks, the School Board, pursuant to the court's preliminary injunction, deducted fair share fees of $29.65 from each of the plaintiffs' salaries and deposited them in the escrow account

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[5]The substance of the letter is as follows:

> I object, to the maximum allowable under the U.S. and Ohio Constitutions, to having any of my agency fee money *collected* or used, even temporarily, to support the multitudinous political, social, ideological and non-collective bargaining causes of the OEA and its affiliates.
>
> Name:
> Home Address:
> Social Security No:
> Employer:
>
> I wish an *immediate* return of that portion of my agency fee money which you have admitted is "impermissible". Obviously, you had no right to *collect* this money in the first place, since you now admit it is non-chargeable.
>
> *However*, I do *not* accept your self-serving calculation as the proper ~~amount of my~~ chargeable agency fee. I do *not* waive any right to a much higher rebate, and you cannot force me to do so as a condition of immediately returning to me the agency fee money which you had no right to collect in the first place. I will not, however, be filing any Ohio SERB charge, because doing so will not protect my paramount constitutional rights as enunciated in the *Hudson* decision.

established, where those funds remain. On February 3, 1987, the defendant unions requested that the School Board cease taking further deductions from plaintiffs until such time as the within action had been tried and a judgment rendered. Pursuant to the Court's order of February 5, 1987, no further fair share deductions have been made from plaintiffs' salaries since that time.

69. On or about Dec. 15, 1986, the OEA sent to plaintiff William Lowary notice of the fair share deduction procedure and a copy of the National Education Association program budget for fiscal year 1986-87. He received those documents on or about Dec. 18, 1986. Sara Wyatt never received this material directly from the defendants, although her counsel received it from LTA/OEA counsel. The OEA mailed the documents to plaintiff Wyatt at the address listed on an OEA enrollment form signed by her at the beginning of the school year.

70. On approximately May 15, 1987, Mr. Lowary received the letter from OEA regarding the American Arbitration Association.[6]

III. DISCUSSION.

The plaintiffs rely principally upon the recent Supreme Court decision of *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). In *Hudson*, the Supreme Court outlined the procedures necessary to prevent the compulsory subsidization of political and ideological causes through the payment of fair share fees by employees who do not support those causes. The Court held that any fair share fee payment

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[6] *Miscellaneous Stipulated Facts:*

a. The parties have supplied true and correct copies of the decision of the Ohio SERB in *Liptak v. Youngstown State University Chapter of OEA*, Case No. 86-REPF-1-0033, and the Hearing Officer's Recommended Decision. The SERB's *Liptak* decision is currently under appeal by both sides.

b. The parties have provided the Court with true and authentic copies of American Arbitration Association publications.

system must include a rebate procedure, and that the rebate procedure must include three general procedural safeguards designed to protect the first amendment rights of non-union members. First, the rebate scheme must insure that the employee's funds are not used, even temporarily, to support unrelated activities; "[a] forced extraction followed by a rebate equal to the amount improperly expended is thus not a permissible response to the non-union employees' objections." *Id.* 106 S.Ct. at 1075. Second, the employee must receive adequate information about the basis of the proportionate fee, because "[l]eaving the non-union employees in the dark about the source of the figure for the agency fee ... does not adequately protect the careful distinctions drawn in *Abood [v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977)]." *Id.* 106 S.Ct. at 1076. Third, the rebate scheme must "provide for a reasonably prompt decision by an impartial decisionmaker ... [because] the non-union employee ... is entitled to have his objections addressed in an expeditious, fair, and objective manner." *Id.*

The plaintiffs have alleged that the rebate procedure used by the union to provide its non-union members an opportunity to object to the amount of the fair share fee and to allow the union to determine the appropriate fair share fee is unconstitutional for each school year since 1984. The rebate procedure in place during 1984-1985, the rebate procedure in place during 1986-1987 each differ from the other in some respects. Thus, the Court finds it useful to discuss each school year's rebate procedure separately for the purposes of determining its constitutionality.

A. *The 1984-1985 Rebate Procedure.*

The defendants argue preliminarily that the plaintiffs' claims with respect to the rebate procedure in place during the 1984-1985 school year are barred by the statute of limitations. The Sixth Circuit has made clear that the statute of limitations applicable to § 1983 actions commenced in Ohio is the one-year statute of limitations contained in Ohio Revised Code § 2305.11. *Jones v. Shankland*, 800 F.2d 77, 80 (6th Cir.1986), *cert. denied*, 481 U.S. 1048, 107 S.Ct. 2177, 95 L.Ed.2d 834 (1987); *Mulligan*

v. Hazard, 777 F.2d 340, 344 (6th Cir.1985), *cert. denied*, 476 U.S. 1174, 106 S.Ct. 2902, 90 L.Ed.2d 988 (1986). The issue becomes, then, on what date the plaintiffs' cause of action accrued with respect to their claim that the 1984-1985 school year rebate procedure violates their constitutional rights. In the Sixth Circuit,

> federal law governs the question of when ... [the] limitations period begins to run.... The statute of limitations commences to run when the plaintiff knows or has reason to know of the injury which is the basis of his action.... A plaintiff has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.

Sevier v. Turner, 742 F.2d 262, 272-73 (6th Cir.1984) (citations and footnote omitted).

The plaintiffs argue that their claim regarding the 1984-85 plan was not time barred because the "final phase" of the rebate procedure is not complete until January 7, 1986 when the umpire issued his rebate determination. The plaintiffs argue that because they had a right to bring an action at any point during the enforcement of the rebate procedure, the January 7, 1986 date is the latest point from which the limitations period should begin to run. Although the Court agrees that the January 7, 1986 date was the last date or phase of the plan, the inquiry of analysis remains on what date did the plaintiffs have reason to know of their alleged injury.

Plaintiff Lowary notified the LTA of his objection to the deduction of fair share fees from his paycheck on September 19, 1984. The plaintiff Wyatt notified the LTA of her objection to the deduction of fair share fees from her paycheck on September 21, 1984. Both plaintiffs mailed identical letters to the LTA. Each letter stated the following:

> It is my belief that my dues/fees will be used for other than these three enumerated purposes, including but not limited to political, ideological, social, economic,

> and/or philosophic purposes or activities of all kinds or nature. I specifically protest and object to the use of my dues/fees for all such non-collective bargaining activities.

Each plaintiff specifically mentioned the first and fourteenth amendment to the United States constitution in their objection letter. Further, plaintiffs received copies of the 1984-1985 school year rebate procedure after they objected in late September, 1984. The school board began deducting the fair share fees on November 9, 1984 and made the last fair share fee deduction for the 1984-1985 school year in March of 1985. Of particular importance is the fact that on or about October 31, 1984, the plaintiffs filed an unfair labor practice charge with the State Employment Relation Board asserting that their constitutional rights had been violated by the fair share fee collection procedure. Moreover, on February 15, 1985, approximately one year and two months prior to filing of the complaint, the plaintiffs' grievance was dismissed by the SERB.

Regarding the January 7, 1986 date asserted by the plaintiffs, the Court finds that nothing happened on that date that would give the plaintiffs any more notice than the facts previously indicated. The umpire's decision did no more than reflect what rebate was due to those that had properly objected under the plan. The plaintiffs objected in September of 1984, but failed to follow the rebate procedure enforced by the union at the time. In sum, the January 7, 1986 date did nothing to put the plaintiffs on notice that any constitutional violations occurred. Rather, the events during the fall of 1984 clearly demonstrate that the plaintiff had due notice of their claims for constitutional violations under the fair share fee collection procedure.

The Court finds that any of the events in the fall of 1984 should have alerted the plaintiffs that the rebate procedure was unconstitutional and violated their constitutional rights and at the latest in February of 1986. Therefore, the Court concludes that the 1984-1985 school year rebate procedure claim is time barred.

B. *The 1985-1986 Rebate Procedure.*

The defendants argue preliminarily that the courts should not apply the *Hudson* decision retroactively to the 1985-1986 rebate procedure claim of the plaintiffs. The defendants raise a difficult issue, because the law of the Sixth Circuit with respect to retroactivity is unsettled. In *Gurish v. McFaul*, 801 F.2d 225, 227 (6th Cir.1986), a panel of the Sixth Circuit applied the Supreme Court's decision in *Loudermill v. Cleveland Board of Education*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), retroactively to a case in which the operative facts preceded the date of the *Loudermill* decision, without considering the three-part test of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The rule in the Sixth Circuit, however, apparently is as follows:

> where .. the [Supreme] Court applies the announced rule to the case before it and makes no statement as to whether it intends the rule to have retroactive or only prospective effect as to other cases, it will be presumed that the Court intends that the rule be given retroactive application. This Court also held that in this situation it is inappropriate to apply the *Chevron* line analysis in determining whether the announced rule should be given retroactive effect as to other cases.

Gurish, 801 F.2d at 227. The *Gurish* case followed *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir.1984) (*en banc*), which first announced the Sixth Circuit's retroactivity rule. The complicating factor is that another panel of the Sixth Circuit, in *Carter v. City of Chattanooga*, 803 F.2d 217 (6th Cir.1986), recently held that the Supreme Court's decision in *Garner v. Memphis Police Dept.*, 710 F.2d 240 (6th Cir.1983), should be applied retroactively after analyzing in detail the *Chevron* factors.

Despite the apparent conflict in the Sixth Circuit, the Court will apply *Hudson* retroactively to the plaintiffs' claims based on the 1985-1986 school year rebate plan. First, *Smith*, the case on which *Gurish* was based, was an *en banc* decision of the Sixth

Circuit, and thus entitled to greater consideration than an apparently contradictory panel decision. Second, the Court notes that the Sixth Circuit recently applied *Hudson* retroactively. *See Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987). Thus, *Hudson* applies to the plaintiffs' claims based on the 1985-1986 school year rebate procedure.

The Sixth Circuit, in *Tierney*, has interpreted more precisely the minimum constitutional requirements that must be in place before a union may collect fair share fees pursuant to an agency shop agreement. The *Tierney* court started with the proposition "that no union or employer may take any action to enforce a non-union member's duty to pay any dues, whether through a deduction from wages or payment from wages already paid, until the plan with procedures meeting the commands of *Abood* and *Hudson* is established and operating." *Tierney*, 824 F.2d at 1504. The procedure must include not simply notice to non-members that a procedure exists and that the non-members may object, but rather

> all non-members must receive an adequate accounting, certified by an independent auditor and setting forth major categories of the union's budgeted expenses that enables a non-consenting employee to intelligently appraise what proportion of his dues would be allocable to the costs of negotiating and administering the collective bargaining agreement and that portion which would advance the union's ideological purposes.

Id. The accounting must clearly identify whether a particular major category of expense, is, in the auditor's view, for ideological purposes or for collective bargaining purposes. The accounting must break out the expenses in this manner, because the *Tierney* court held that the union may not deduct any amount as a fair share fee that constitutes monies that clearly a union used for ideological purposes. *Id.* The union must immediately reduce the objector's fair share fee by an amount equivalent to the amount identified by the accounting as representing monies expended for ideological purposes. By the same token, a union

may collect and use for its benefit those amounts that clearly represent monies expended for collective bargaining related purposes. The union must escrow any amount that falls between the two clearly identified amounts, the so-called " 'gray area' for many expenses that may concurrently advance neither or both of these interests, and which *Hudson* recognizes may be subject to dispute and hence to resolution by an impartial decisionmaker." *Id.* The burden for showing entitlement to the disputed, escrowed fund remains with the union at the accounting stage and during arbitration. *Tierney*, 824 F.2d at 1505.

The *Tierney* decision's emphasis on providing a detailed accounting prior to requiring a non-member to object furthers the goal of *Hudson*. In *Hudson*, the Supreme Court was concerned that the tension between the non-union member's constitutional right to be free from coerced expression and the union's constitutional right to collect fair share fees from non-union members, and avoid the "free rider" problem. The procedural requirements of *Hudson* are intended to "prevent[ ] compulsory subsidization of ideological activity by employees who object thereto without restricting the Union's ability to require every employee to contribute to the cost of collective bargaining activities." *Hudson*, 106 S.Ct. at 1074 (quoting *Abood*, 431 U.S. at 237, 97 S.Ct. at 1800). The specific accounting required under *Tierney* provides a ready mechanism for allowing the union to collect those monies unequivocably related to the collective bargaining process while at the same time preventing forced extraction from non-union objectors of funds unequivocably related to the union's ideological purposes.

The rebate procedure for the 1985-1986 school year is relatively simple. Once a non-union member files a written objection with the Local Teachers Union, the non-union member receives a copy of the document entitled "Administrative Procedure: Agency Shop Refund," and a copy of the previous year's budget for the NEA, the OEA, the appropriate OEA District Association, in the case of the plaintiffs, the NCOEA, and the local association, in this case for these plaintiffs, the Lexington Teachers Association. Upon receiving the objection,

the OEA determines what it describes as the preliminary refund. The preliminary refund is computed by taking the percentage of non-collectible funds from the previous year, as determined by the impartial decisionmaker, and taking that percentage of the current year's designated fair share fee. The OEA then adds an additional 5% of the current year's dues to this amount, and places the entire preliminary refund into an escrow account. The non-union objector also receives an explanation of the basis of the previous year's percentage of non-collectible funds.

The OEA selects an impartial decision-maker, which it calls the "umpire," who is a member of the National Academy of Arbitrators with experience in public sector labor relations. The OEA provides the umpire with copies of its budget and other documents requested by the umpire. The non-union objector may submit written material to the umpire by mailing the material to the OEA in Columbus by November 1 of that year. The umpire determines the percentage of OEA's total expenditures for the membership year that was "expended in support of partisan political or ideological causes not germane to the work of the employee organization in the realm of collective bargaining." Appendix 1. This same umpire computes the percentage of the NEA funds.

The OEA then computes a "final refund." The final refund is determined by taking the percentage of non-collectible funds from the OEA to the OEA fair share fee paid, and the percentage determined by the umpire as non-collectible NEA. The OEA takes the percentage of non-collectible funds attributed to the OEA and applies that percentage to the local affiliate and the appropriate OEA district association. The OEA issues a check in the amount of the final refund, plus interest, no later than December 31.

The OEA rebate procedure does not comport with the constitutional minimum requirements outlined in *Tierney*. First, the non-union objector must file a written objection prior to receiving copies of the budgets, which are the only financial information about the association expenditures received by the

non-union objector. *Tierney* requires that the potential objector receive the accounting information prior to the filing of an objection. *Tierney*, 824 F.2d at 1503. Second, the financial information must set forth the major categories of the union's budget expenses in a manner that enables the non-union objector to determine a proportion of his dues that relate to the costs of negotiating and administering the collective bargaining agreement, and the proportion of his dues related to the union's ideological purposes. The budget information provided under the terms of the 1985-1986 rebate procedure is insufficient in that regard. The budget information does not identify those expenses of the union that clearly are related to ideological purposes, or those expenses that are clearly related to collective bargaining, negotiation and administration, and do not identify the "gray area" between those two categories that reasonably is in dispute. Thus, the financial information provided the non-union objector under the OEA rebate plan does not comply with the *Tierney* standard. Third, the financial information is not certified by an auditor as required under *Tierney*.

The OEA rebate procedure also runs afoul of *Tierney* with respect to its escrow provisions. Although the Supreme Court allows an association to base a current year advance reduction, the plan does not provide for the escrow of amount reasonably in dispute. Under *Tierney*, the union must identify an escrow amounts in those gray areas. The procedure also does not provide the non-union objector with an advance reduction in his dues based on the clearly ideological proportion of the fee. The OEA procedure calls for escrow of the entire preliminary refund, with the non-union objector receiving the rebate by check over a year later. Under *Tierney*, the association must return immediately to the objector the amount clearly related to ideological expenses, and escrow either the gray area, or all the remaining monies collected.

The rebate procedure also does not provide for a reasonably prompt decision by an impartial decisionmaker. The OEA procedure provides that the OEA selects an arbitrator who is a member of the National Academy of Arbitrators. The *Tierney*

court specifically rejected the procedure that allowed the union to choose the arbitrator because it "is not a sufficient limitation upon the otherwise 'unrestricted choice' of the union." *Tierney*, 824 F.2d at 1507. In addition, the OEA procedure calls for the final refund to take place by December of the following school year. The OEA procedure thus calls for the dissenter to receive the refund over one year after the objection. The *Tierney* court concluded that such a time period for receiving the final refund is not reasonably prompt. *Id.*

In conclusion, the rebate procedure in place during the 1985-1986 school year runs afoul of each of the three general categories of constitutional procedure required under *Hudson* and as applied by *Tierney*. The Court also notes that the OEA plan is remarkably similar to the City of Toledo procedure declared unconstitutional in no uncertain terms by the Sixth Circuit in *Tierney*.

The Court also finds that plaintiff Sara Wyatt failed to object to the fair share fee deduction in the 1985-86 school year. Stipulated Fact 35. It is well settled that the dissenting member bears the duty of objecting to the fair share fee before relief is granted. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 306 n. 16, 106 S.Ct. 1066, 1076 n. 16, 89 L.Ed.2d 232 (1986); *Abood v. Detroit Board of Education*, 431 U.S. 209, 238, 97 S.Ct. 1782, 1801, 52 L.Ed.2d 261 (1977). Accordingly, any relief or damages as a result of the deduction, made in the year 1985-86 are foreclosed as to the plaintiff Sara Wyatt.

C. *The 1986-1987 Rebate Procedure.*

The OEA changed its rebate procedure after the Supreme Court issued its decision in *Hudson*. Thus, the 1986-1987 school year rebate procedure is different from the rebate procedure used in 1985-1986.

The new procedure provides that the OEA will determine by November 15 of the fiscal year the percentage of impermissible expenses for the previous fiscal year. The OEA will calculate

the percentage of impermissible expenses to the total expenses, and apply that percentage to the current fiscal year dues amount the OEA has previously declared. The OEA will add to its percentage the percentage the NEA reports of its dues that are impermissible. The OEA will take the combined percentage, calculated compared with the current fiscal year dues, and arrive at a rebate amount. The fair share fee is equal to the dues amount less the rebate amount.

The 1986-1987 rebate procedure also has a notice provision. By November 15 of the fiscal year, or by the date on which the OEA received the independently certified audit of its previous year's financial records for itself and the NEA, the OEA will notify all fair share fee payers of the amount of the fair share fee. Included in the notification will be an explanation of how the fees are calculated, copies of the audited financial records, and a copy of the fair share fee rebate procedure. The notice informs the fair share fee payer of the right to object to the amount of the fair share fee, and informs the fair share fee payer that he must mail the objection to the OEA within thirty days after a "determination date" identified by the OEA.

The new procedure also establishes two separate classes of objectors. Category 1 objectors indicate their willingness to accept the fair share fee amount computed by the association, that they waive their right to have an impartial decisionmaker review the association computed fair share fee amount, and that they are entitled to an immediate payment of their rebate. Category 2 objectors indicate that they wish to challenge the amount of the fair share fee computed by the association, that they desire 100% of all fair share fees collected by them to be placed in an escrow account, and that they wish an impartial decisionmaker to review the fair share fee amount determined by the OEA. If the objection does not indicate which category the objector intends to participate in, the OEA assumes that the objector intended to be a category 1 objector.

The original 1986-1987 rebate procedure provided that the State Employment Relations Board (SERB) would serve as the

impartial decisionmaker. Subsequently, the OEA altered the procedure and identified the American Arbitration Association (AAA) as the impartial decisionmaker. The AAA will make the impartial decision according to its own rules.

The 1986-1987 rebate procedure does not comport with the requirements of *Hudson* and *Tierney*. The OEA apprises members of the bargaining unit of their right to be a fair share fee payer at the time they decide whether they want to become members of the union. The notice derived from the language of the collective bargaining agreement included in the teacher contract simply informs the bargaining unit member that he or she must pay fair share fees if they choose not to join the union. The collective bargaining agreement language does not in any way explain that a person may receive a rebate for certain expenses.

The procedure does not provide adequate time between the date on which the fair share fee payer receives the audited financial records of the OEA and the NEA, and the date of the first deduction of fees. As indicated in *Tierney*, the notice and opportunity to object must occur prior to the deduction of any fair share fees. *Tierney*, 824 F.2d at 1503.

The procedure provides that November 15th is the earliest date on which a fair share fee payer will receive the financial information; the first deduction always occurs sometime in early November. Although the financial information that appears to be the type that will be provided to the fair share fee payer does break the expenses down into chargeable and non-chargeable expenditures, the break down as it stands now does not divide the expenses into the three categories contemplated by the *Tierney* court: clearly chargeable expenses; clearly non-chargeable expenditures; and those expenditures that reasonably might be disputed by parties. The failure of the OEA to break the information down into these three groups prevents the OEA from complying with *Tierney*'s mandate that the fair share fee payer receive an immediate refund of the clearly non-chargeable

expenses, and that the OEA escrow all of the monies that reasonably might be disputed.

The category 1 and category 2 differentiations in the procedures are similarly unconstitutional because *Tierney* mandates that all fair share fee payers receive an immediate refund of clearly non-chargeable expenses. Category 1 objectors receive an immediate refund, but must waive any right to dispute the amount of the preliminary refund. Category 2 objectors do not receive an immediate refund as required under *Tierney*. Thus, the category 1 and category 2 objector portion of the procedure does not pass constitutional muster.

Although the original 1986-1987 procedure contemplated the use of SERB as the independent decisionmaker, the OEA has substituted the American Arbitration Association as the independent decisionmaker. Thus, the issue of SERB's acceptability as the independent decisionmaker is moot, and the Court has no comment on the use of SERB as the independent decisionmaker. Although the plaintiffs argue vehemently that the American Arbitration Association is composed of pro-union personnel, and that the arbitrators selected by the AAA are necessarily biased, the Court is not persuaded by the plaintiffs' arguments. The Court in *Hudson* was concerned with situations where the selection of the independent decisionmaker was exclusively controlled by the union. The OEA's procedure calls for the AAA itself to select the arbitrator once the OEA informs the AAA that an impartial decisionmaker will be required to determine the amount of the fair share fee. With respect to the impartiality of the AAA and its rules, the Court is convinced that AAA can function as an impartial decisionmaker within the meaning of the Supreme Court in *Hudson*. *See, Andrews v. Education Ass'n. of Cheshire*, 829 F.2d 335 (2d Cir.1987).

IV. CONSTITUTIONAL CHALLENGES TO OHIO REVISED CODE, SECTION 4117.09(C).

The plaintiffs challenge the constitutionality of Ohio Rev.Code § 4117.09(C) both on its face and as applied to them. The plaintiffs first argue that the statute does not provide adequate procedural protection to non-members. The plaintiffs argue that requiring a rebate procedure without more fails to protect the significant first and fourteenth amendment rights of the plaintiffs. Therefore, according to the plaintiffs, the Act is unconstitutional on its face because it is not reasonably susceptible to any constitutional construction. The defendant and the Ohio Attorney General argue that the statute is constitutionally valid on its face because the statute may be applied consistently with the constitution.

The defendant's and the Ohio Attorney General rely heavily on *Robinson v. State of New Jersey*, 806 F.2d 442 (3rd Cir.1986) as a standard of analysis interpreting the facial constitutionality of a statute. The *Robinson* court stated that "[i]t is well established that the courts will not invalidate a statute on its face simply because it *may* be applied unconstitutionally, and only if it *cannot* be applied consistently with the Constitution." *Robinson*, 806 F.2d at 447 (emphasis in original) (relying on *Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984)). The defendants and the attorney general point out that the Ohio statute specifically requires that the terms of any rebate procedure "conform[ ] to federal law." Although the 1985-86 and 1986-87 plans violate the constitutional minimums established by *Hudson*, the statute is not void of any constitutional application. The Court finds that with a proper constitutionally structured fair-share procedure, the statute can be read consistent with the Constitution. Accordingly, the plaintiffs' facial attack is not well taken because the plaintiff has failed to establish that the statute is neither so vague as not to afford procedural guarantees or so broad as to impose a chilling effect on the rights protected.

The plaintiffs next argue that the statute is unconstitutional as applied by the State Employment Relations Board (SERB). The basis of plaintiffs' claim is that the SERB dismissed the plaintiffs unfair labor grievance in violation of the *Hudson* standards. The SERB's dismissal of the plaintiffs' grievance was based on the SERB's decision in *Bowles v. American Federation of State, County and Municipal Employees, Ohio Council 8, Local 1543*, Case No. 84-UU-04-0783 (Aug. 28, 1984). *Bowles* held that a challenge to a rebate procedure under Ohio Rev.Code § 4117.09(C) cannot be raised under the Unfair Labor Practice Statute, Ohio Rev. Code § 4117.12. The Court agrees with the Ohio Attorney General when he states that "there is certainly nothing implicit in either *Hudson* or the Constitution that requires a state to permit challenges to rebate procedures to be following through a proceeding concerning unfair labor practices rather than specifically designed review procedures." Trial Brief of Intervenor Anthony J. Celebrezze, Jr., Attorney General of Ohio at 11. Moreover, *Bowles* merely held that the claim of a constitutional violation under § 4117.09 without more does not in itself establish sufficient probable cause that an unfair labor practice has occurred. The SERB stated that:

> [p]erhaps it is conceivable that a factually and procedurally effective rebate claim would also support a charge of an unfair labor practice.... But in no event will rebate unfairness constitute a per se violation of the duty of fair representation. If a complaint is to issue, based on a claimed unfair labor practice, facts have to be adduced to support the charge.

Bowles, Case No. 84-UU-04-0783 at 3.

The Court finds that the plaintiffs' claim of an unconstitutional application of Ohio Rev.Code § 4117.09 is unsupported by the facts. Rather the SERB's decision reflects an application of the unfair labor practice statute and not Ohio Rev.Code § 4117.09. Further, any assumed infringement on the plaintiff's rights by the SERB's dismissal are substantially protected by the

statute's prescribed remedy procedure and the plaintiff's ability to seek redress in other forums such as this one.

V. SCHOOL BOARD AND INDIVIDUAL MEMBERS' LIABILITY.

The plaintiffs argue that the school board has committed independent constitutional violations under Ohio Rev.Code § 4117.09 by delegating full authority to the Union in the determination and collection of agency fees. The Board argues that they do not have an independent duty to provide a separate rebate procedure nor an independent duty to audit the union's financial determinations. Further, the defendant Board argues that the rebate procedure imposed on the union does not require duplicative responsibilities by the Board, e.g., the duty to provide a reasonably prompt opportunity for a decision by an impartial decisionmaker, and notice requirements.

The Court finds that the essence of the Board's argument is that they are only obligated to follow what the union instructs them to do, and thus they avoid liability for any wrongful act as long as a union was the impetus of the action. The Board's argument is inconsistent with *Hudson* and Ohio Rev.Code § 4117.09. *Hudson* implicitly recognizes that it is the government employer and the union who share the duty in establishing a constitutionally valid fair-share fee procedure. The union's duty, after all, is derivative to the fact that the employer is a governmental actor. To permit a public employer to escape any duty in the implementation of the plan, would impose a governmental standard of conduct on a purely private entity. *Hudson* and cases that follow simply do not support such a conclusion. *See, e.g., Tierney*; *McGlumphy v. Fraternal Order of Police*, 633 F.Supp. 1074 (N.D.Ohio 1986).

Accordingly, the Court declines to accept the defendant Board's request to dismiss the Board from this cause of action. Any equitable remedy must necessarily include the Board.

The individual board members, sued in their official capacity, argue that the plaintiffs have failed to establish any independent constitutional violation on their part. Further, that they are not necessary parties to fulfill any equitable relief awarded plaintiffs and are immune from compensatory damages. The plaintiffs have made no genuine claims as to the individual's liability outside of the allegations contained in their complaint.

The Court finds that the individual board members are not necessary to this action, having denied the Board's request to dismiss, nor has it been established that they independently violated the plaintiffs' constitutional rights. Accordingly, the Court will dismiss the claim against the individual board members.

VI. CONCLUSION.

The Supreme Court has held that "the task of fashioning a proper remedy is one that should be performed by the district court after all interested parties have had an opportunity to be heard." *Hudson*, 106 S.Ct. at 1077 n. 22. However, it is not the function of this Court to write a constitutionally permissible plan. "The district court's function, ... is only to assure that any plan at least meets the minimum constitutional requirements under the First and Fourteenth Amendments." *Tierney*, 824 F.2d at 1502.

Therefore, having determined that the plaintiffs have established that the plans in effect for the 1985-86 year and the 1986-87 years are unconstitutional, the Court will retain continuing jurisdiction over this matter to ensure that a constitutional remedy is established.

IT IS SO ORDERED.

APPENDIX 1

ADMINISTRATIVE PROCEDURE

AGENCY SHOP REFUND

The Refund Procedure will operate as follows. During the 1982-83 membership year, the Ohio Education Association (hereinafter "OEA") will place in an escrow account 100% of any agency shop fees received from dissenting fee payers. After the end of the membership year, an impartial umpire will determine the percentage of the total 1982-83 OEA expenditures that is in support of partisan political or ideological causes not germane to the work of the employee organization in the realm of collective bargaining. This percentage will provide the basis for allocating the money in the escrow account between the dissenting fee payers and the associations. The same procedure will be followed in subsequent membership years, except that the amount placed in the escrow account will be based upon the percentage determined by the umpire for the preceding membership year, plus a 5%-of-dues "cushion" to minimize even further the possibility that the agency shop fees of dissenting fee payers will be used for impermissible purposes.

A. *Agency Shop Fees Paid for the 1982-83 Membership Year*

(1) Any person who pays an agency shop fee for the 1982-83 membership year to an OEA local affiliate may file a written notice with the local affiliate objecting to the alleged expenditure of said fee for the purposes as stated above (hereinafter "dissenting fee payer"). The objection notice may be phrased in general terms (i.e., an objection to the expenditure of the fee for impermissible purposes) and need not identify specific expenditures. It will be timely if received by the local affiliate within thirty (30) days after the dissenting fee payer

(a) made his or her first payment of the agency shop fee, or

(b) was informed of his or her right to request a refund pursuant to this Refund Procedure, whichever is later. Within ten (10) business days after receipt of any objection notice(s), the local affiliate shall file an exact copy of said notice(s) with OEA at its Columbus, Ohio Headquarters.

(2) Within ten (10) business days after an objection notice is received by OEA, OEA will deposit the amount that is received by the local affiliate and forwarded to OEA up to and including the date the local affiliate received the objection notice. Said deposit shall be in a flat-rate interest-bearing escrow account at a bank in Columbus, Ohio. OEA, in addition, will deposit in the escrow account the portion of the agency shop fee that the local affiliate receives and forwards to OEA subsequent to the date it received the objection notice, said deposits to be made within ten (10) business days after receipt of the money.

(3) Within ten (10) business days after an objection notice is received by OEA the dissenting fee payer will be sent a copy of
(a) this Refund Procedure, and
(b) the 1982-83 membership year budgets of the National Education Association (hereinafter "NEA"), OEA, appropriate OEA District Association and the relevant local affiliate.

(4)(a) Prior to the end of the 1982-83 membership year, OEA will retain a member of the National Academy of Arbitrators, who has experience in public sector labor relations, to serve as the Agency Shop Fee Umpire (hereinafter "Umpire").
(b) After the end of the 1982-83 membership year, the Umpire will determine the percentage of OEA's total expenditures for said membership year that was expended in support of partisan political or ideological causes not germane to the work of the employee organization in the realm of collective bargaining.
(c) In making the aforesaid determination, the Umpire will be guided, to the extent possible, by the decision of the

United States Supreme Court in *Abood vs. Detroit Board of Education*, and such other decisions of federal and state courts and administrative agencies as he or she deems relevant.

(d) OEA will provide the Umpire with copies of its budget for the 1982-83 membership year and such other documents as he or she deems relevant. Any dissenting fee payer may submit written material to the Umpire relevant to the aforesaid determination by sending such material to:

Representation Fee Umpire
c/o Ohio Education Association
225 E. Broad Street
P.O. Box 2550
Columbus, Ohio 43216

The material will be timely if received by OEA prior to November 1, 1983.

(e) The Umpire will submit a written report to OEA which sets forth the percentage called for in paragraph (b) above and explains how it was determined.

(5) The procedure set forth in Section 4 above will be followed by NEA in order to determine the percentage of its total expenditures for the 1982-83 membership year that was expended for purposes not related to collective bargaining, contract administration and grievance processing, provided that dissenting fee payers who desire to submit written material to the Umpire will send such material to:

Representation Fee Umpire
c/o Ohio Education Association
225 E. Broad Street
P.O. Box 2550
Columbus, Ohio 43216

The reports of both the OEA and NEA Umpires are referred to hereinafter collectively as the "Umpire's Report."

(6) The "Final Refund," will be determined by applying

(a) the percentages called for in Sections (4) and (5) above for OEA and NEA to the portions of said fees paid to OEA and NEA, respectively, and

(b) the percentage called for in Section (4) for OEA to the portion of said fees paid to the relevant local affiliate and the appropriate OEA District Association.[1]

(7)(a) As soon as possible after the end of the 1982-83 membership year, but in no event later than December 31, 1983,[2] OEA will send to a dissenting fee payer a check for the amount of the Final Refund appropriate for his or her bargaining unit,[3] plus interest on such amount, and a notice informing him or her how the refund was calculated, together with a copy of the Umpire's Report.
(b) The Final Refund will be paid from the dissenting fee payer's escrow account, and any money remaining in said account(s) after such payment will be distributed as may be appropriate among NEA, OEA, appropriate OEA District Association and/or the relevant local affiliate.

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[1]Over 500 local associations and nine (9) District Associations are affiliated with OEA, and an analysis of individual budgets would entail excessive delay, expense, and burden. Since it generally is conceded that local and District Associations expend *at least* as much, and probably more, of their budgets for permissible purposes as defined in this procedure, across-the-board use of the OEA percentage would appear to provide the dissenting fee payers with adequate protection.

[2]This has been selected as the deadline date because OEA and NEA could not provide the Umpire with an audited statement of actual expenses for the 1982-83 membership year until approximately December 1, 1983.

[3]A dissenting fee payer who pays a fee for less than an entire year will receive a proportionately reduced Final Refund. Likewise should the agency fee established in a particular bargaining unit be less than 100% of the annual United Teaching Profession dues, UniServ service fee and assessments of the members of the affiliate representing the bargaining unit, and dissenting fee payer shall receive a proportionately reduced Final Refund.

B. *Agency Shop Fees Paid for Membership Years Subsequent to the 1982-83 Membership Year*

(1) The procedure set forth in Section A(1) above for filing an objection notice for the 1982-83 membership year will apply for subsequent membership years.

(2) Within ten (10) business days after the objection notice is received by OEA, OEA will:
(a) Determine a "Preliminary Refund," which will be calculated by
(i) applying the percentages used to determine the Final Refund for the preceding membership year to the membership dues for the membership year in question,[4] and
(ii) adding five (5) percent of said dues as a "cushion."
(b) Establish at a bank in Columbus, Ohio, a flat-rate interest-bearing escrow account and deposit in said account an amount that reflects the relationship that the portion of the agency shop fee that the local affiliate has received and forwarded to OEA up to and including that date it received the objection notice bears to the Preliminary Refund; and send the dissenting fee payer a notice informing him or her:
(i) of the amount of the refund that a preliminary determination indicates he or she is entitled to receive for the membership year in question, and that this amount will be deposited in a flat-rate interest-bearing escrow account in a bank in Columbus, Ohio.
(ii) of the basis for this determination, together with a copy of the budgets of NEA, OEA, the appropriate OEA District Association, and the relevant local affiliate for the membership year in question; and

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[4]If agency shop fees are received by a local affiliate before these percentages have been determined (see, December 31 deadline date in Section A(7)(a) above), OEA will escrow 100% of said fees received by it from the local affiliate, and make appropriate adjustments in the escrow accounts after the determinations have been made.

(iii) that a further communication regarding the amount of his or her refund will be sent after the end of the membership year in question.

(3) OEA will deposit in the aforesaid escrow account the appropriate portion of the agency shop fee that the local affiliate receives and forwards to OEA subsequent to the date it received the objection notice, said deposits to be made within ten (10) days after receipt of the money.

(4) After the end of the membership year in question, the procedure set forth in Sections A(4) through (7) above regarding Final Refunds for the 1982-83 membership year will be followed, provided that:
(a) references to dates in 1982 and 1983 will refer to the same dates in the years in question; and
(b) if the amount in the escrow account is insufficient to pay the full amount of the Final Refund, including interest, to which he or she is entitled, the money required for this purpose will be paid from the treasury funds of OEA which shall recover appropriate prorated amounts from the NEA, District Association, and the relevant local affiliate.

(Policy 200.06)

March 1983

APPENDIX 2

FAIR SHARE FEE REBATE PROCEDURE

The Ohio Education Association, hereinafter referred to as the Association, on behalf of itself and its affiliated national, district, and local associations herewith establishes the following procedure relative to advance reductions/rebates of fair share fees collected in Ohio by the Association and its affiliates in order to comply with the Constitutional and state statutory standards established by *Abood v. Detroit Board of Education*, *Ellis v.*

Railway Clerks, and *Hudson v. Chicago Teachers Union*, and Section 4117.09 of the Ohio Revised Code. Fair share fee payors who file written objections with the Association as hereafter provided shall be entitled to pay a reduced amount as the fair share fee. Fair share fee payors who do not file written objections as provided herein will be required to pay the full amount of the fair share fee as specified by the appropriate collective bargaining agreement. This procedure will be reviewed periodically and revised as necessary to reflect legal developments in this area.

I. Definitions—For the purpose of this procedure:

A. *Association Activities* means those activities engaged in by the local association that is recognized as the exclusive bargaining agent and by its affiliated district association and its affiliated parent organizations, the Ohio Education Association and the National Education Association.

B. *Escrow Agent* means the bank, savings and loan association, other financial institution, or a real estate title insurance company having escrow powers which is located in Franklin County, Ohio and is selected by the Association to receive, hold, and disburse fair share fee monies collected from objecting fee payors.

C. *Fair Share Fee* means the annual fee that an employee in a fair share fee bargaining unit who does not become a voluntary unified member is required to pay to support his/her per capita share of the cost of Association activities.

D. *Fair Share Fee Payor* means all persons in an affiliated local association fair share fee bargaining unit who have not, as of November 1st of each membership year, voluntarily enrolled as unified members of the Association.

E. *Impermissible Expenditures* means those expenditures of an employee organization for Association activities which are in

support of partisan political and ideological causes not germane to the work of the employee organization in the realm of collective bargaining. Impermissible expenditures also include those Association activities and expenditures which are classified as member-only benefits (e.g., interest free loans to members only and guaranteed insurance benefits to members only) by Association Executive Committee policy. In determining whether an expenditure is an impermissible expenditure, the Association shall apply the decisional law of the United States Supreme Court, the United States Sixth Circuit Court of Appeals, and the Federal district courts sitting in Ohio as to those categories or classification of expenditures for which an advance reduction or rebate is constitutionally required and also apply all decisional law of SERB.

F. *Membership Year* means the Association's fiscal and membership year which commences September 1st annually and ends August 31st annually.

G. *Objecting Fee Payor* means a fair share fee payor who objects in writing to the expenditure of his/her fair share fee for impermissible expenditures.

H. *SERB* means the State Employment Relations Board established by Chapter 4117. of the Ohio Revised Code.

I. *Unified Dues* means the dues that an employee in the fair share fee bargaining unit in the relevant job category (e.g., full-time teacher, full-time school support personnel member, etc.) is required to pay in order to be a unified member of the Association during the current membership year.

J. *Unified Member* means those persons who have voluntarily enrolled as a member of the United Education Profession.

II. Annual Determination of the Amount of the Fair Share Fee

Not later than the 15th day of November annually the Association shall determine the total amount of Association impermissible expenditures for the preceding membership year and calculate the percentage which the total Association impermissible expenditures for the preceding membership year bears to the total expenditures for Association activities for the preceding membership year.

The Association's percentage of impermissible expenditures for the preceding membership year so determined shall be applied to the current membership year unified dues for membership in the state, district and local[1] associations to arrive at the OEA, district, and local rebateable portion of the fair share fee.

The National Education Association shall provide the Association with its calculation of the amount or percent of the NEA rebateable portion of the fair share fee.

The amount of the rebateable portion of the NEA fair share fee plus the amount of the rebateable portion of the OEA, district, and local fair share fee constitutes the "fair share fee rebate."

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[1]Over 500 local associations and nine (9) district associations are affiliated with OEA, and an analysis of each individual budget would entail excessive delay, expense, and burden. The Association has, and will continue to, periodically review the expenditures of selected district and fair share fee local associations. These reviews have clearly established that local and district associations expend significantly less, as a percentage of their budgets, for impermissible expenditures than does the Association. This application of the Association's percentage of impermissible expenditures to the district and local portions of the fair share fee provides objecting fee payors with adequate protection of their Constitutional and state statutory rights and has been upheld by the federal district courts in other jurisdictions.

The Association-Determined fair share fee for the fair share fee bargaining unit shall be the amount of the current membership year unified dues for the fair share fee payor if he/she had elected to become a unified member of the bargaining unit minus, in the case of objecting fee payors, the fair share fee rebate.

III. Annual Notice to Fair Share Fee Payors

Upon receipt of: i) the independent certified public accountant's audit report of the Association's financial records for the preceding membership year, and ii) an independent certified public accountant's report of the NEA expenditures for the preceding membership year, or November 15th, whichever is later, the Association shall annually notify each fair share fee payor for the current membership year by first class mail at his/her home address as disclosed by bargaining unit or employer records, of the amount of the Association-Determined fair share fee for the current membership year, and an explanation of how it was calculated, and include copies of the NEA, the Association, and the appropriate district association (if available) audited reports for the preceding membership year, copies of the adopted budgets of the NEA, the Association, the appropriate district association and the local association which is the exclusive bargaining agent for the current membership year, and a copy of this Administrative Procedure.[2] The notice shall advise each fair share fee payor of his/her right to file a written objection notice with the Association objecting to the alleged expenditures of said fee for impermissible expenditures, and his/her obligation to pay

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[2]In the case of a person who is employed subsequent to the commencement of the membership year, and who therefore does not receive the notice as provided herein, the Association upon knowledge of the person's fair share fee payor status shall give such notice. If a timely Category II objection notice is received from such person subsequent to the SERB determination of the fair share fee, the Association shall dispense with the escrow and pay the SERB-determined rebate directly to the person.

the full amount of the bargained fair share fee if he/she does not file a timely written objection notice. The objection notice shall be mailed to the Ohio Education Association, P.O. Box 2550, 225 East Broad Street, Columbus, Ohio 43216 or delivered to the Association at the street address stated above. The objection notice may be phrased in general terms (i.e., an objection to the expenditures of the fee for impermissible expenditures) and need not identify or challenge specific expenditures. The objection notice must include the following:

a) the fair share fee payor's—
   i. name
   ii. home address
   iii. social security number
   iv. employing school district

b) a statement indicating whether the fair share fee payor
   i. accepts the Association-Determined fair share fee rebate, waives his/her right to have the amount of the rebate promptly determined by an impartial decisionmaker, and demands the immediate payment of the Association-Determined rebate or words to that effect (Category I objecting fee payor) or
   ii. challenges the amount of the Association-Determined rebate and demands that all of his/her fair share fees received by the Association be placed in escrow pending a prompt determination of the amount of the rebate by an impartial decisionmaker or words to that effect (Category II objecting fee payor).

The objecting fee payor may meet the requirements of this clause b) by stating that he/she wishes to be treated as either (but not both) a "Category I objecting fee payor" or as a "Category II objecting fee payor", as the case may be. However, if an objection notice does not clearly express the preference, the Association shall treat the objection notice as a Category I objection notice and an immediate Association-Determined rebate shall be paid.

The notice to the fair share fee payor shall also specify a determination date which shall not be earlier than the actual date of mailing of the notice and the determination date shall be used and applied by the Association for i) determining the timeliness of all objection notices received by the Association requesting rebates (both Category I and Category II objecting fee payors), and ii) determining the timeliness of petitions filed with SERB challenging the amount of the rebate.

A Category II objecting fee payor who wishes to be involved in the SERB proceeding as a party to the challenge of the amount of the Association-Determined fair share fee must also file a timely petition with SERB (see O.R.C. Section 4117.09(C) and SERB Rule 4117-11-01).

Objection notices requesting immediate payment of the Association-Determined rebate (Category I objection notices) or challenging the amount of the Association-Determined rebate (Category II objection notices) will be timely if postmarked or otherwise received by the Association within thirty (30) days of the determination date. A petition filed with SERB to challenge the amount of the rebate will be timely if filed with SERB within thirty (30) days of the determination date (see O.R.C. Section 4117.09(C) and SERB Rule 4117-11-01).

An objection notice is only valid for the membership year to which it relates and there is no presumption that an objecting fee payor in one membership year continues to be an objecting fee payor in any other membership year.

IV. Payment of the Rebate

A. If the objecting fee payor files a Category I objection notice which constitutes a waiver of the fee payor's right to challenge the amount of the Association-Determined rebate and requests immediate payment of the rebate and the fair share fee payor has not also filed a challenge to the amount of the rebate

with SERB, the Association shall mail, by first class mail, the Association-Determined rebate to the fair share fee payor.[3]

B. If the objecting fee payor files a Category II objection notice to challenge the amount of the Association-Determined rebate (or the objecting fee payor has also filed a challenge to the amount of the rebate with SERB), the Association shall, within ten (10) business days after receipt of the objection notice (or notice of the SERB filing) deposit 100% of the amount that is received by the Association with respect to the Category II objecting fee payor up to and including the date the Association received the Category II objection notice with the Escrow Agent. In addition, the Association will deposit with the Escrow Agent 100% of the fair share fee that the Association receives subsequent to the date it received the Category II objection notice, said deposits to be made within ten (10) business days after receipt of the money.

The funds received by the Escrow Agent for the escrow account shall be held in a flat-rate interest-bearing account. The escrow agreement with the Escrow Agent shall provide that i) the funds held in escrow with respect to a specific membership year shall not be commingled with funds now or hereafter received by the Escrow Agent with respect to any other membership year, and ii) the funds in the escrow account with respect to a membership year shall be distributed, plus accrued interest, only in accordance with the decision of SERB with respect to the amount of the fair share fee rebate for the membership year under consideration pursuant to Section V below.

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[3]An objecting fee payor who pays a fair share fee for less than the entire membership year will receive a proportionately reduced rebate. Likewise, should the fair share fee established for a particular bargaining unit be less than 100% of the unified dues, the objecting fee payor shall receive a proportionately reduced rebate.

V. Implementation of the SERB Decision

A. The amount of the fair share fee that SERB determines may be charged to a Category II objecting fee payor shall be referred to hereinafter as the "Impartially-Determined Fair Share Fee." Upon receipt of the SERB decision of the Impartially-Determined Fair Share Fee, the Association shall cause the Escrow Agent to disburse any money, including interest, that may be in the escrow account in accordance with the SERB decision. If the Impartially-Determined Fair Share Fee is less than the Association-Determined fair share fee, then the Association shall reduce appropriately the amount paid by all Category II objecting fee payors whose fair share fees are held by the Escrow Agent as hereinafter provided. If the Category II objecting fee payor is paying the fair share fee by payroll deduction, the Association may, at its option, arrange for the employer to adjust the amount of future fair share fee payroll deductions or refund the excess amount included in each deduction promptly after the Association receives said deduction from the employer, or pay to such Category II objecting fee payor in a single lump sum the total excess amount that shall be deducted for the remainder of the current membership year.[4]

B. The fact that the Category II objecting fee payor or the Association has challenged the amount of the Impartially-Determined Fair Share Fee in Court or in any other forum shall not preclude the Association and/or the Escrow Agent from taking the actions set forth in this Section.

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[4]See note 3, supra.

VI. Appeals from the SERB Decision

The Association reserves the right to appeal the SERB decision, but only as to issues of the classification or categories of Association expenditures which the United States Constitution or the Ohio Revised Code require the Association to provide an advance reduction or a rebate, but such appeal, if successful, shall not operate to increase the Impartially-Determined Fair Share Fee for the membership year in dispute.

APPENDIX E

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

March 2, 1988

William LOWARY, et al., Plaintiffs,

v.

LEXINGTON LOCAL BOARD OF EDUCATION, et al., Defendants.

No. C86-1536A.

United States District Court,
N.D. Ohio, E.D.

March 2, 1988.

ORDER

DOWD, District Judge.

I. INTRODUCTION.

This is a § 1983 action brought by the plaintiffs challenging the fair share fee provisions of the collective bargaining agreement between the defendant Lexington Local Board of Education and the defendant Lexington Teachers' Association. The case was submitted to the Court on stipulated facts and on October 21, 1987, the Court issued a Memorandum Opinion finding that the fair share fee provision plans for the years 1985-86 and 1986-87 were unconstitutional. 704 F.Supp. 1430. The Court maintained continuing jurisdiction over this action for the supervision of a proper relief and remedy.

The Court has before it a number of matters pending for resolution including: (1) the plaintiffs' motion for partial reconsideration of the memorandum opinion issued on October 21, 1987, docket # 131; (2) the defendant Ohio Education Association's (OEA) motion for partial reconsideration of the October 21, 1987 memorandum opinion, docket # 134; (3) the constitutional validity of the OEA's proposed fair share fee procedure for the year 1987-88, docket # 138 and # 147; (4) the

determination of the monetary and equitable relief; and (5) the plaintiffs' motion to intervene in the cross complaint filed by the Lexington Local Board of Education against the Lexington Teachers Association and the Ohio Education Association, docket # 140.

The Court conducted a hearing on all the above-described motions on January 11, 1988 with counsel present and participating. Upon consideration of the parties' briefs and oral arguments, the Court is now in a position to rule on the motions and questions before the Court.

II. MOTIONS FOR RECONSIDERATION.

A. *Plaintiffs' Motion for Partial Reconsideration.*

The plaintiffs move the Court pursuant to Rule 59, Fed.R.Civ.P. for reconsideration of that part of the Court's memorandum opinion of October 21, 1987 which holds that the plaintiff, Sara Wyatt, is precluded from relief or damages as a result of the deductions made in the year 1985-86 because she failed to object to the use of her funds for noncollective bargaining purposes. The plaintiffs argue that the Court found that for the year 1985-86 the fair share fee procedure employed by the union failed to provide for proper notice of the fair share fee reduction, proper financial disclosure, and a proper opportunity to object. Consequently, the plaintiffs argue that Ms. Wyatt cannot be penalized for failing to object under a plan that was constitutionally deficient in terms of notice. The defendant Association opposes the plaintiffs' motion and argues that the Court correctly decided that Ms. Wyatt is precluded from relief in the year 1985-86 because she failed to object to the fee collection.

At page 1446 of the October 21, 1987 memorandum opinion, the Court found

> that plaintiff Sara Wyatt failed to object to the fair share fee deduction in the 1985-86 school year. Stipulated Fact 35. It is well settled that the dissenting member bears the duty of objecting to the fair share fee before relief is granted. *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 1076 n. 16 (1986); *Abood v. Detroit Board of Education*, 431 U.S. 209, 238 (1977). Accordingly, any relief for damages as a result of a deduction, made in the year 1985-86 are foreclosed as to the plaintiff Sara Wyatt.

Memorandum Opinion at 1446. The plaintiff argues that the cases cited in *Hudson* at footnote sixteen addressed the issue of requiring an objection before a challenge to the expenditure of fees, and not to a challenge of whether a plaintiff was afforded due process in the collection of the fees. The plaintiffs argue that the latter is the case here, i.e., that there is a challenge to the collection aspect of the fair share fee and a denial of due process. Accordingly, the plaintiffs argue that the plaintiff Sara Wyatt was not afforded proper due process because of the inadequate notice under the 1985-86 fair share fee reduction plan and as such, could not properly object to a constitutionally deficient plan. The defendant Association argues that there is no distinction between expenditures and collection in the cases relied upon by this Court in denying plaintiff Wyatt's relief in the year of 1985-86 are controlling here. The Court agrees.

The Court declines to accept the plaintiffs' due process argument on a motion for reconsideration. The plaintiffs have failed to convince the Court that it has overlooked or neglected to adopt any alternative reasoning. Moreover, this is the first time the plaintiffs have attempted to make this collection versus expenditure distinction. The Court remains committed to the decision that plaintiff Sara Wyatt's failure to object to the 1985-86 plan for a year's deductions foreclosed any relief for violations of that year's deductions. The relevant case law supports the defendant's proposition that dissent is not to be presumed.

Accordingly, the plaintiffs' motion for reconsideration is denied.

B. *Defendants' Motion for Reconsideration.*

The defendant Association's motion for reconsideration pursuant to Rule 59, Fed.R.Civ.P., asks the Court to reconsider that part of the October 21, 1987 memorandum opinion which addresses the role of the independent auditor in the fair share fee computation process. The defendant Association takes exception to the Court's interpretation of *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987), where the Court stated that "[t]he accounting must clearly identify whether a particular major category of expense, is, *in the auditor's view*, for ideological purposes or for collective bargaining purposes." Memorandum Opinion at 1444 (emphasis added). The defendant Association asks the Court to delete the phrase "in the auditor's view" from page 1444 of the memorandum opinion because *Tierney* and Supreme Court cases on this issue clearly do not require the auditor to perform such a task. The plaintiff opposes the defendant Association's motion for partial reconsideration and argues that the Court properly identified the role of the auditor.

The defendant Association argues that the Court's holding requires the auditor to make an independent determination of what items are chargeable and nonchargeable to objecting nonmembers. The defendant Association argues that such a requirement goes beyond the mandate of *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) and *Tierney*. The defendant Association argues that those two cases merely required that the union's expenditures be verified by an independent auditor, and did not require the independent auditor to make a legal determination of chargeability. The legal determination of chargeability is, according to the defendant Association, a decision to be made by the impartial decisionmaker.

The defendant Association directs the Court's attention to the Second Circuit case of *Andrews v. Education Ass'n of*

Cheshire, 829 F.2d 335 (2d Cir.1987) where the Second Circuit specifically addressed the role of the independent auditor. The fair share fee procedure under attack in *Andrews* provided a nonmember with two types of financial information. First, the nonmember received the year-end financial report of the union showing its various expenses verified by an independent auditor. *Andrews*, 829 F.2d at 339. Second, the nonmembers were provided a memorandum listing the unaudited major categories of chargeable activities. *Id.* The nonmembers argued that the fair share procedure was constitutionally inadequate because it did "not provide for an independent audit of the breakdown of expenditures to each major category of chargeable activities, even though it [did] provide for independent verification of the past-year's expenditures." *Id.*

The Second Circuit carefully considered the standards enunciated by the Supreme Court in *Hudson* and concluded that the nonmember's interpretation of the role of independent auditor was misplaced. The Court viewed the nonmembers argument as requiring the auditor to make a legal determination of chargeability rather than an accounting decision. *Andrews*, 829 F.2d at 340. The Second Circuit found that "*Hudson*'s auditor requirement is only designed to ensure that the usual function of an auditor is fulfilled. That usual function is to ensure that the expenditures which the union claims it made for certain expenses were actually made for those expenses." *Id.* The Court viewed the nonmember's approach as requiring the independent auditor to make the same decision as the impartial decisionmaker. "The appellants' interpretation of *Hudson*'s auditing requirement is overly broad because it seeks to have the auditor function both as an auditor in the traditional sense and as the independent decisionmaker as to chargeable expenses." *Id.* (footnote omitted). The defendant Association asks this Court to adopt a similar analysis regarding the role of the independent auditor.

The defendant Association also argues that although *Tierney* may be read broadly, it cannot be read as requiring the independent auditor to make the determination of chargeability. The defendant Association points out that the Court's interpretation

of *Tierney* fails to cite any particular statement upon which it can rely on in determining that it is the "auditor's view" which should be employed in making the chargeability determination at the audit stage. Furthermore, the defendant Association requests the Court to take notice of another decision in this district which found that the independent auditor is under no duty to make the determination of chargeability. *See, Gillespie v. Willard City Board of Education*, 700 F.Supp. 898 (N.D.Ohio, 1987).

Finally, the defendant Association argues that an accountant is not qualified to make the legal determination of a chargeability. The defendant Association stands ready to present the Court with proof as to the qualifications of an accountant to make a legal determination of chargeability.

The plaintiffs argue that *Tierney* clearly held that the independent auditor "must allocate the union's expenses and make the initial determination as to which expenses are 'chargeable-nonchargeable and gray area.' " Moreover, the plaintiffs argue that the Court is required to follow the mandate of *Tierney*. Plaintiffs' Response to the Defendant Association's Motion at p. 2. The plaintiffs argue that *Tierney*'s holding on the role of the auditor was frequently repeated.

The Court agrees with the defendant Association's analysis and finds that *Hudson* does not require the independent auditor, typically an accountant, to make an initial determination of chargeability[1] at the audit stage. The ultimate chargeability decision, as explained in *Andrews*, is a decision left to the independent decisionmaker. If the Court were to adopt the plaintiffs' position of requiring the independent auditor to make the initial determination of chargeability a two-tiered chargeability

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[1]It is clear that *Tierney* requires the union to separate its expenses into the three categories of chargeable, nonchargeable, and those reasonably in dispute, i.e., the gray area. *Tierney*, 824 F.2d at 1504. The Court, for purposes of convenience, will generally refer to that process collectively as the "initial chargeability decision."

determination would be created. The first tier of the chargeability determination, under the plaintiffs' plan, would be made by the independent auditor and subject to the review, the second tier, by the impartial decisionmaker.

The Court further finds that *Tierney* does not require, as argued by the plaintiff, the independent auditor to make the initial determination of chargeability at the audit stage. Throughout the *Tierney* decision, when the Sixth Circuit Court of Appeals refers to the role of the auditor, it uses the terms "certified" and "verified." (e.g. "all non-members must receive an adequate accounting, *certified* by an independent auditor." *Tierney*, 824 F.2d at 1504, (emphasis added); "[t]he independent auditor must *verify* each major category in the union's budget or expenses for each major category of expenses and indicate which categories comprise each component." *Id.*). Further, in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987), the Sixth Circuit Court of Appeals stated that "*Hudson* ... mandates the *verification* of the union's calculations and disbursements from the fund by means of an independent auditor." *Damiano*, 830 F.2d at 1370, (emphasis added) (citing *Hudson*, 475 U.S. at 307, n. 18, 106 S.Ct. at 1076 n. 18; *Tierney*, 824 F.2d at 1504.). Moreover, in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292, 106 S.Ct. at 1066, 89 L.Ed.2d 232 (1986), the Supreme Court used the term "verification." "The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as *verification* by an independent auditor." *Hudson*, 475 U.S. at 307, n. 18, 106 S.Ct. at 1076, n. 18 (emphasis added). In sum, no where can it be found that *Tierney*, nor any other court, requires the independent auditor, at the audit stage, to make an initial determination of chargeability. The auditor's role is to place a verification or certification on the funds claimed to be expended by the union in various categories including the

funds which the union claims to be chargeable, non-chargeable, and those reasonably in dispute.[2]

The decision in *Tierney* itself clearly indicated that the chargeability decision was one that is vested in the impartial decisionmaker.

> The range of union expenditures will no doubt be as broad and varied as there are unions. It is not necessary for us to anticipate the categorization of any potential expense, but we see this as an administrative determination by the independent decisionmaker, under the law developing in cases such as *Ellis v. Railway Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984).

Tierney, 824 F.2d at 1504-05. Clearly then the Sixth Circuit Court of Appeals did not envision the independent auditor, again typically an accountant, to make the initial determination of chargeability. The Sixth Circuit recognized that the chargeability decision was a decision for the impartial decisionmaker.

Plaintiffs argue that if the independent auditor does not make the initial determination of chargeability, there is no check on the union in terms of the financial information they provide to a nonmember. The plaintiffs argue that nonmembers should

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[2]The Court notes that in the OEA's 1987-88 independently verified budget, there are no expenses identified as reasonably in dispute. It is clear that under *Tierney*, the union is entitled to the clearly chargeable portion of non-members fees and the nonmember is entitled to an advance reduction for that part which is clearly nonchargeable. However, those expenses that are in dispute should be escrowed. *Tierney*, 824 F.2d at 1504. One could argue that a union may err on the side of chargeability rather than on the side of reasonably in dispute because the union can collect the chargeable expenses. That issue, however, is not before the Court here because under the OEA plan, the OEA escrows both the chargeable expenses and those in dispute pending the impartial decisionmaker's final determination.

be provided with an independent determination, at the outset, of chargeability so that the nonmember can make an informed decision. The defendant Association, however, argues that such a process does not provide a nonmember with a clear picture of what the union's position is on various expenses. The defendant Association argues that by permitting the union to break out its expenses and what it believes to be chargeable, under explained criteria, a nonmember is provided with a clear picture of the union's position. Under this approach, the nonmember is provided with an accurate indication of where the union stands on expenses. It is the union's position on what it views as chargeable that is important to a nonmember, and not the position of an independent auditor. The nonmember, therefore, can make an informed decision as to whether to object.

Because the Court finds that *Hudson* and *Tierney* do not require the independent auditor to make the initial determination of chargeability, the Court finds it unnecessary to address the issue of whether an accountant is qualified to make a legal determination of chargeability. At the hearing on January 15, 1988, counsel for plaintiffs and counsel for defendants disputed whether an accountant was qualified to make the legal determination of chargeability versus nonchargeability. The Court finds it unnecessary to resolve that issue in light of the finding that neither *Tierney* nor *Hudson* requires an independent auditor or accountant to make such a determination.

The Court concludes, therefore, that the defendants' motion for partial reconsideration is well taken. To the extent that the memorandum opinion of October 21, 1987 held that *Tierney* requires the independent auditor to make an initial determination of chargeability, that holding is vacated. The Court finds that *Hudson*, *Tierney*, and *Damiano*, only require that the independent auditor, at the audit stage, verify the union's calculations and disbursements presented to the nonmember before the decision to object must be made. The propriety of the chargeability decision by the union is a decision left for the impartial decision-maker. The Court further finds that final holding of October 21, 1987 is not disturbed by the Court's reconsideration of the

auditor's role. The Court previously found numerous other constitutional deficiencies in the relevant plans rendering them constitutionally inadequate notwithstanding the Court's present reconsideration.

III. CONSTITUTIONAL VALIDITY OF THE OEA PROPOSED FAIR SHARE FEE PLAN 1987-88.

A. *Introduction.*

Before the Court is a proposed OEA fair share fee advance reduction procedure for 1987-88.[3] The plaintiffs have come forward with a series of objections to the rebate plan proposed by the OEA. The Court's obligation in reviewing the proposed plan is "to assure that [the] plan at least meets the minimum constitutional requirements under the First and Fourteenth Amendments." *Tierney v. City of Toledo*, 824 F.2d 1497, 1502 (6th Cir.1987).

At the outset, the Court notes that under an order of October 29, 1987, subsequent to a status call with counsel participating, the Court granted leave to all parties to submit proposed plans on a permissible rebate procedure. The Court also provided leave of Court to all parties to submit any objections to any proposed procedure. The Court has received only the plan presented by the OEA. In response, the OEA has provided the Court with a detailed plan that attempts to meet the minimum constitutional requirements. The plaintiffs have declined the Court's invitation and limited their efforts to a search for defects in the plan arguing that any one detailed

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[3]The OEA's proposed fair share fee advance reduction procedure as presented to the Court is set out in Appendix I.

imperfection necessarily requires the rejection of the entire plan.[4] The Court, however, for the reasons that appear below, finds that with one qualification, the proposed OEA plan meets the minimum constitutional requirements.

B. *The Plan.*

The proposed plan begins with a general statement of the purpose of the fair share fee reduction. The general statement informs the nonmember that they are obligated to pay their fair share fee but are not obligated to pay that part of the union fee that goes to support "partisan politics or ideological causes not germane to the work of the Association in the realm of collective bargaining." The general introduction provides that the nonmembers who elect not to pay the full fee must object in writing.

The general outline of the fair share fee procedure begins with the manner of notice given to nonmembers. The plan provides for general notices at the place of employment at the beginning of each school year.[5] Further, no later than December 15th of each year, the union will mail each nonmember a packet of information including a financial list of expenditures made by the Association verified by an independent auditor with an explanation of chargeable expenses, an explanation of the portion of the fair share fee that is chargeable to the nonmembers, the method used to calculate the chargeable proportion, and a copy of the plan.

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[4]In response to the Court's inquiry at the hearing, the OEA represented that of the approximately one hundred ninety school districts in Ohio that permit unions to collect fees from nonmembers, approximately 700 members of those locals do not belong to the union. Thus, if one were to assume that each of the 700 nonmembers objected to the collection of their fee, the total fees in question would amount to approximately $210,000 ($300 per year multiplied by 700). Transcript of January 15, 1988 Hearing at pp. 25-27.

[5]Attached to the plan is a specimen copy of the notice to be posted at the places of employment.

A nonmember electing to object to the payment of full fair share fee, under the plan, must file a written objection with the union by January 15th. The first deduction of the fee under the plan does not occur prior to January 15th. After receipt of the objection, "but before fair share fee deductions begin, the Association will send the nonchargeable portion of the full year's fair share fee to each objector as the advance reduction of the annual fee." Furthermore, "the Association will place an amount equal to the chargeable portion and the portion, if any, that may reasonably be in dispute, of the full year's fair share fee in an interest-bearing escrow account established by the OEA with an escrow agent."

Thereafter and on an annual basis, all objections will be consolidated into one hearing before an arbitrator selected by the American Arbitration Association under its rules.[6] The arbitrator will conduct a hearing and determine the proportion of the fair share fee that is chargeable to nonmembers under the applicable law. After the arbitrator's decision, the Association disburses all funds in the escrow account, including interest, to the proper parties in accordance with the arbitrator's decision. The plan employs a presumption for the calculation of the local's fair share fee percentage. "The percentage of chargeable expenditures by local and district associations will be presumed by the arbitrator to be whatever percentage is found to be appropriate for chargeable OEA expenditures."

The plan concludes that an objector must exhaust remedies provided in the plan before seeking judicial review of any issues capable of resolution under the proposed procedure.

C. *Plaintiffs' Objections.*

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[6] A copy of the American Arbitration Association rules is attached to the fair share fee procedure plan.

The plaintiffs' objections to the OEA's proposed rebate procedure include eight specific objections. At the outset, however, the plaintiffs raise two general objections to the proposed OEA plan.

First the plaintiffs argue that the OEA failed to provide the Court and the parties with the necessary financial disclosure and notices so that an informed and proper decision could be made on the validity of the plan. The defendant Association did not provide the Court with the financial package when it filed its proposed plan. However, subsequently defendant Association filed a response to the plaintiffs' objections to the plan and attached a number of exhibits. Exhibits A through F attached to the defendant Association's response represents the entire package a nonmember would receive[7], including the financial information required to be provided under the plan. The Court has reviewed the financial information provided by the defendant Association and finds that the plaintiffs' first objection is not well taken.

The plaintiffs' second general objection is that the OEA failed to show that its proposed procedure has been actually adopted by any governing body of the union. The defendant Association has provided the Court with the affidavit of Jon A. Ziegler, the general counsel of the Ohio Education Association who states that the procedure has been adopted by the OEA and is currently in full force and effect. Affidavit of Jon A. Ziegler, ¶ 1. Mr. Ziegler's affidavit establishes that the plan has been

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[7]The OEA supplied the Court with exhibits that represent the materials provided by the OEA to nonmembers. The packet of information includes: (1) a copy of the OEA Fair Share Fee Advance Reduction Procedure; (2) the verified audit of the OEA's financial statements; (3) the verified audit of the financial statements of the National Education Association of the United States; (4) the financial statement of the North Central Ohio Education Association; (5) the financial statement of the Lexington Teachers Association (Richland); and (6) the OEA's cover letter explaining the contents of the packet and the fair share fee. The materials total approximately 109 pages of written material.

adopted by the OEA.[8] The plaintiffs' second general objection is not well taken.

The Court will consider each of plaintiffs' remaining specific objections *in seriatim*.

1. Standard of Chargeability.

The plaintiffs object to the language employed by the union in describing the nonchargeable fee for an objecting nonmember. The general introduction to the plan includes the following explanation

> [u]nder Ohio law, employees who choose not to join the Association may elect to not pay the portion of their fair share fees based upon Association expenditures in support of partisan politics or ideological causes not germane to the work of the Association in the realm of collective bargaining.

The plaintiffs assert that the OEA's description of what is properly nonchargeable is not consistent with the broad standard designated in *Tierney*. The plaintiffs argue that *Tierney* maintains that a union "may collect *only for those expenses affirmatively related to the bargaining agreement* because these constitute the only expenditures that, consistent with the First and Fourteenth Amendments under *Abood* and *Hudson*, the union may collect to prevent non-members' 'free-riding.' " *Tierney*, 824 F.2d at 1505 (emphasis in original). The defendant Association, on the other hand, argues primarily that the language used in the statement is a verbatim quotation from the Ohio statute on fair share fee collections.

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[8]The Court notes that the union has adopted the 1987-88 fair share fair rebate plan notwithstanding any decision by this Court. The union asserts that it was necessary to adopt the plan before its self imposed December 15 deadline of financial disclosure and the January 15 deadline for beginning of deductions.

Ohio Rev.Code § 4117.09(C) provides that "[t]he internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine [sic] to the work of employee organizations in the realm of collective bargaining." The defendant Association contends that the statutory language closely parallels that of the Supreme Court's in *Abood v. Detroit Board of Education*, 431 U.S. 209, 235-36, 97 S.Ct. 1782, 1800, 52 L.Ed.2d 261 (1977). The defendant Association argues that the union cannot be faulted for quoting the language provided by the State which in turn followed the language used by the U.S. Supreme Court. Moreover, the defendant Association argues that the language cited by the nonmembers in *Tierney* and other cases is merely dicta and "short hand for more expansive concepts." The Defendant Association's Response to the Plaintiffs' Objections to the Rebate Procedure, p. 4.

The defendant Association also argues that the issue of chargeability is one that is not before the Court at this point. Rather, the decision for the Court at this juncture is to determine whether the plan is presumably constitutionally valid within the confines of its opinion and relevant precedent. The defendant Association concludes that the chargeability standard is one that was not litigated in this case and thus is not ripe for decision.

The issue of what is the proper standard of chargeability is not before the Court. The plaintiffs brought this suit alleging that the plans in effect for particular years were unconstitutional. The parties are not before the Court litigating the exact standard of chargeability. Accordingly, the Court agrees with the defendant and finds that the decision of the chargeability standard is one left for the impartial decisionmaker under the applicable law at that time.

The plaintiffs' first specific objection to the OEA's proposed rebate plan is not well taken.

2. Adequacy of Notice Regarding Obligation of Nonmembers Dues.

The plaintiffs argue that the notice attached and identified as "Exhibit A" to the OEA's proposed rebate procedure inadequately represents the law to nonmembers. Specifically, the plaintiffs argue that the notice provides that the employee must either join the union or pay the fair share fee, and that statement is fraudulent. The defendant Association argues that the notice merely states, in accordance with applicable law, that a nonmember will be liable for fees equal to that of members unless a nonmember objects to the deduction.

The Court finds that the proposed notice submitted with the OEA's plan adequately informs the nonmember that the nonmember will be charged a fee equal to the amount of dues unless he objects and obtains an advance reduction. The notice clearly states that a person can either become a member of the union or pay a fair share fee to the Association as a nonmember. Moreover, the proposed notice also informs the nonmember that they will be provided with a copy of the internal procedure adopted for advance reduction. The Court finds that the proposed notice does not in any manner present false information to the nonmembers or coerce them into believing that their fair share fee actually equals one hundred percent of the voluntary members' dues as the plaintiffs would have this Court to believe. It is clear that under the cases subsequent to *Hudson* the union may collect a fee equal to that paid by a member unless a nonmember objects to such an amount.

Plaintiffs' objection to the adequacy of the notice is not well taken.

3. Financial Disclosure and Chargeability Determination by the Independent Auditor.

The plaintiffs' third specific objection to the proposed OEA plan goes to the same issue addressed in the defendants' motion for partial reconsideration. That issue is whether the independent auditor must actually make the initial allocation of the chargeable-nonchargeable gray area categories. Basically, the

respectives parties' positions are identical to those that were contained in the defendants' motion for partial reconsideration.

As stated earlier, the Court has carefully considered the role of the independent auditor and has determined that it is not the role of the auditor to make an initial chargeability, nonchargeability, gray area determination. Rather, it is the independent auditor's role to verify an audit of the expenditures provided by the union. The OEA's proposed fair share fee plan specifically provides for the verification of the expenditures made by the Association by an independent auditor. The Court finds that such a policy is constitutionally sufficient.

The Court notes that the OEA's proposed plan requires even more than the plan in question in *Andrews v. Education Ass'n of Cheshire*, 829 F.2d 335 (2d Cir.1987). In *Andrews*, under the plan examined by the Court, the nonmember received two separate financial disclosures. First, an independently audited itemization of expenditures, and second, a memorandum breaking out the different categories of chargeable, nonchargeable expenditures. The second item received by the nonmembers was not independently audited. Nonetheless, the Second Circuit found that the independent audit of the expenditures was enough to pass constitutional scrutiny. The proposed OEA plan here in question goes one step further than the plan in *Andrews* and requires an independent audit of both their expenditures and their chargeability determinations. Thus, the nonmember is presented with a detailed audited expenditure explanation by the union and an audited chargeability determination.

The plaintiff's objection to the role of the auditor is not well taken.

4. Adequate Financial Disclosure of OEA Affiliates.

The plaintiffs object to the OEA's proposed plan on the basis that it does not call for adequate financial disclosure of the affiliate unions, including the National Education Association, the North Central Ohio Education Association, and the Lexington

Teachers Association. The plaintiffs argue that the OEA's attempt to lump together the different levels of the union allows the union to circumvent the required audits at each level of the union organization. The plaintiffs assert that audits are required at each level under *Tierney*. The plaintiffs argue that the lack of detailed audits at each level of OEA affiliates in the proposed procedure renders it unacceptable by this Court.

The defendant Association argues that they have provided for a detailed accounting at all levels of the union by applying a presumption to the different union affiliates. The OEA's plan states that

> [t]he percentage of chargeable expenditures by local and district associations will be presumed by the arbitrator to be whatever percentage is found to be appropriate for chargeable OEA expenditures. Since the local and district associations spend a significantly larger percentage of their budgets on chargeable expenditures, this presumption means that objectors will be charged less than they lawfully could be charged.

The defendant Association further relies on the presumption by citing to other courts who have approved a similar presumption. *See, e.g., Gillespie v. Willard Board of Education*, 700 F.Supp. 898 (N.D.Ohio 1987); *Andrews v. Education Ass'n of Cheshire*, 653 F.Supp. 1373 (D.Conn.1987).

The *Gillespie* court found that a similar presumption utilized in a fair share fee challenge before the court was a permissible presumption. The *Gillespie* court relied on the district court decision in *Andrews v. Educational Ass'n of Cheshire*, 653 F.Supp. 1373 (D.Conn.1987) where the district court stated that "use of the evidentiary presumption that the statewide figure is appropriate for the locals satisfies constitutional requirements, even if in rare instances there may arise situations in which this presumption is incorrect." *Andrews*, 653 F.Supp. at 1378. The issue of the use of the presumption was not raised on appeal. *Andrews v. Cheshire*, 829 F.2d 335, 338 n. 1 (2d Cir.1987). Both *Gillespie*

and the district court opinion in *Andrews* relied on *Robinson v. State of New Jersey*, 547 F.Supp. 1297 (D.N.J.1982), reversed on other grounds, 741 F.2d 598 (3rd Cir.1984) *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 366 (1985) as a basis for the approval of the presumption. In *Andrews*, the district court found that the presumption appeared reasonable and relied on dicta from *Robinson* where the court stated that the local associations are less likely to engage in as extensive lobbying efforts than a state national organization and thus the monies expended on those types of expenses would be less. In *Robinson*, however, the court did not address the same presumption at issue in *Andrews*, *Gillespie*, and this case.

The Court finds that the basic scheme of the presumption is, on its surface, reasonable. However, the Court is concerned that it has before it no evidence that the local officials expenditures are in fact less than that of the statewide percentage. In both *Andrews* and *Gillespie*, the procedural vehicle upon which the cases were decided was a motion for summary judgment. Neither court, however, identified its factual foundation for the asserted presumption. Similarly, the parties in this case have not come forward with evidence, by way of affidavit or otherwise, that would establish that the presumption offered is factually founded. At the same time, the Court is fully aware that it has not given the parties an opportunity to put on evidence regarding the statewide presumption. Without a factually based presumption, it may seem inappropriate for the Court to adopt what it believes to be a reasonable presumption in light of the substantial constitutional limitations imposed upon the collection of non-member fees.

However, the Court is also cognizant of the fact that to require each level of the union to go through the process outlined by the OEA would so unduly burden the union that it may be effectively forced to cease the collection of the nonmember fees, altogether.

Consequently, the Court finds that for the purposes of validating the procedure outlined by the OEA, the presumption

which applies by the statewide figures to the local associations is appropriate. However, an objecting nonmember, as indicated below, is entitled to object to the local expenditures. The Court cautions that the impartial decisionmaker, after hearing the evidence and weighing the objections, may determine that there is no basis in fact for such a presumption. In such a case, the impartial decisionmaker may very well find that in certain locals the percentage of the fair share fee reduction is higher at the local level than at the statewide level.

5. Objection to Single Consolidated Hearing for Objections.

The plaintiffs object to the OEA's proposed procedure for adopting a consolidated hearing for all appeals to the impartial decisionmaker. The plaintiffs primary argument in furtherance of their objection is that a single consolidated hearing precludes nonmembers from challenging expenditures of their local individual bargaining units thus limiting the nonmembers' challenge to the OEA's expenditures only. The net result of such a procedure according to the plaintiffs is unfairness.

The defendant Association contends that a consolidated hearing in no manner infringes upon a nonmember's objection to local expenditures. The defendant Association directs the Court's attention to the affidavit of Jon Ziegler where he states that he

> attended much of the hearing recently conducted by the impartial decision-maker chosen by the American Arbitration Association, covering the 1985-86 and 1986-87 school years. At the hearing, expenditures by local and district associations were discussed by Association witnesses and challenged by objecting nonmembers.

Affidavit of Jon Ziegler, ¶ 3. Furthermore, the defendant Association asserts that the plan in no manner states that a nonmember is precluded from objecting to local affiliate expenditures at the consolidated hearing.

The Court declines to find the OEA's plan constitutionally fatal based upon the plaintiffs' objection to the single consolidated hearing. The plaintiffs argue that such a consolidated hearing is unfair and precludes the challenge of local affiliate expenditures. The defendants have rebutted the claim with an affidavit and a clear indication that the plan does not preclude the objection of local expenditures at the consolidated hearing. The conclusory claim of unfairness does not require invalidation of the proposed plan.

6. AAA Appointed Arbitrator and AAA Rules.

The plaintiffs object to the OEA's "unilateral" selection of the American Arbitration Association and the AAA's rules for impartial determination of union fees. The plaintiffs argue that such a selection is one step removed from allowing the union to unilaterally select the arbitrator itself. The defendants counter and assert that the court clearly held in its memorandum opinion of October 21, 1987, that the selection of the AAA was constitutionally permissible. Furthermore, the defendants argue that in *Damiano v. Matish*, 830 F.2d 1363 (6th Cir.1987), the Sixth Circuit also validated the use of the AAA appointed arbitrator.

The Court declines to accept the plaintiffs' objection to the OEA's proposed procedure plan which identifies the AAA as the body which will pick the impartial decisionmaker. The same arguments raised here have already been addressed in the memorandum opinion and for the reasons stated therein, the Court maintains that the use of the AAA arbitrator is constitutionally permissible.

Accordingly, the Court declines to find the OEA's plan constitutionally flawed based upon the objection asserted by the plaintiffs.

7. Promptness of Hearing.

The plaintiffs assert that there is no guarantee on the face of the proposed procedure that the impartial decisionmaking

process will begin promptly. The plaintiffs admit that the arbitrator's ruling is required by June 15 in any given year, however, they claim that there is no guarantee that the union will not delay the time for the hearing and later rush the hearing through towards the end of May. The defendant Association merely asserts that the AAA rules provide for a full opportunity to contest the issues, and that each party will be given an adequate opportunity to present its issues.

The Court finds that the plaintiffs' objection to the promptness of a hearing is without merit. The Court finds that the asserted objection has failed to set forth facts, case authority, or anything within the plan that would indicate a problem with the promptness of the hearing.

Accordingly, the Court declines to find the OEA's proposed plan constitutionally invalid based upon the plaintiff's claim of an absence of a guarantee for a prompt hearing.

8. The Exhaustion Requirement.

The proposed rebate procedure plan states that "[a]ny objector must exhaust the remedies provided by this procedure, and by law, before seeking judicial review of any issues capable of resolution under this procedure." The plaintiffs argue that such an exhausting requirement is an outright violation of the nonmember's right of access to the courts. The plaintiffs rely on *Patsy v. Board of Regents*, 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982) for the requirement that no administrative remedies need be exhausted before bringing any § 1983 action. The plaintiffs similarly rely on other cases holding that a constitutional violation claim need not be administratively exhausted before access to federal court. *See, e.g., Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir.1985); *Wilkerson v. Johnson*, 699 F.2d 325 (6th Cir.1983); *United Church of the Medical Center v. Medical Center Com'n*, 689 F.2d 693 (7th Cir.1982); *Columbus Ed. Ass'n v. Columbus City School Dist.*, 623 F.2d 1155 (6th Cir.1980).

The defendant Association argues that "[t]he exhaustion requirement is just another notice to potential objectors that they will lose their right to relief if they do not object according to the procedure." It is not, according to the defendant Association, a requirement that claims of violation of constitutional rights be exhausted before seeking access to courts.

The Court finds that the language in the last paragraph of the OEA's proposed procedure plan could reasonably be taken to require a nonmember to exhaust all the avenues available in a procedure plan before asserting any rights in federal court. In light of the substantial issues raised in constitutional violations, and the cited case law, the Court finds that such language in the OEA plan should be omitted.

Accordingly, the last paragraph of the proposed plan must be omitted to meet the constitutionally minimum standards.

IV. RELIEF.

In addition to assuring that a proper plan is in effect, the Court retained jurisdiction over this matter subsequent to the filing of the memorandum opinion on October 21, 1987 on the issue of the appropriate relief. The parties have extensively briefed the issue of relief and the Court has had an opportunity to consider the briefs and arguments of each party.

In the amended complaint, the plaintiffs seek equitable relief, compensatory damages, punitive damages, attorney's fees, and any additional relief the Court may deem proper. (*See* paragraphs A-G, Prayer for Relief, Amended Complaint).

In terms of equitable relief, plaintiffs first seek a permanent injunction aimed at enjoining the defendants from collecting fees, forcing nonmembers to pay fees, and enforcing the rebate procedure under the constitutionally invalid plans for the years 1985-86 and 1986-87. The plaintiffs claim that injunctive relief is necessary in order to assure that the unions will not seek to enforce their constitutionally invalid plans. The plaintiffs claim

that the union's voluntary termination of those rebate plans and the implementation of the new plan does not diminish the need for the injunctive relief.

The defendants, on the other hand, argue that an injunction is not necessary because there is no indication that the union will employ the use of the 1985-86 and 1986-87. Further, the defendant Association argues that they have already adopted an entirely new rebate procedure consistent with the guidelines enunciated in the Court's holding.

The Court agrees with the defendant Association and declines to impose the permanent injunctive relief requested by the plaintiffs. The use of the procedures in the years 1985-86 and 1986-87 have been terminated and replaced by a new plan that meets the constitutional minimums of the first and fourteenth amendments. Further, the Court finds that there is no indication that the unconstitutional plans will be employed by the union after the Court extinguishes its duty under the law.

The plaintiffs also submit that as part of the permanent injunction remedy, the Court should enjoin and insure that before collecting any agency fees, the Board independently verify the notice sent to a fee payor regarding the advance reduction fee, the Board independently verify "through a neutral attorney or accountant, that adequate financial disclosure has been sent to the fee payor," and that the Board independently review the entire rebate procedure to make sure that it complies with the requirements of the first and fourteenth amendments. The Board argues that the Board has in the past and continues to provide all union and nonunion employees with copies of the current collective bargaining agreement, which includes the fair share fee clause at the beginning of each school year and that they are required to do no more than what they currently provide. The Board further argues that the relief requested by the plaintiffs as against the Board is not only unnecessary but also duplicative and impractical. The Court agrees.

The plaintiffs' requested equitable relief against the Board would require the Board to duplicate essentially all of the primary procedures that are required by the union. At the same time, the public employer cannot blindly follow the lead of the union and then claim no responsibility for constitutional violations. By entering into the collective bargaining agreement, however, the employer bears the risk of joint responsibility for any constitutional violation as a result of that agreement. In this case, the constitutional violation has occurred and the Board is thus jointly liable for the relief identified herein. Although the Court recognizes that the primary relief is, in practical terms, related to the union's performance, the relief is also equally applicable to the Board. Accordingly, the Court denies the plaintiffs' request for equitable relief as against the Board.

As another element of equitable relief, the plaintiffs claim that they are entitled to a full refund of all fees collected under the 1985-86 and 1986-87 rebate plans with interest. The plaintiffs claim that such a remedy will make the plaintiffs whole and act as a deterrent for the defendants regarding the implementation of a constitutionally invalid rebate procedure. The plaintiffs further argue that the defendant Association had no right to collect the money from a nonmember absent a constitutionally valid plan.

The defendant Association argues against full restitution of the fees collected under the 1985-86 plan and the 1986-87 plan. The defendants argue that the plaintiffs are entitled only to those amounts of money determined to be non-chargeable by the impartial decisionmaker for the years in question with interest. The defendant Association directs the Court's attention to its decision in *McGlumphy v. Fraternal Order of Police*, 633 F.Supp. 1074 (N.D.Ohio 1986) where the Court stated that "[t]he appropriate remedy ... first requires the implementation of constitutionally sufficient procedures for determining the appropriate rebate, and ultimately requires the F.O.P. to return to the plaintiffs that amount of the collected dues not used to support collective bargaining, contract administration, and grievance adjustment activities." *McGlumphy*, 633 F.2d at 1084.

Moreover, the defendant Association argues that a full refund of all fees collected would defeat the purpose of the fair share fee provisions and allow the nonmembers to receive a "free ride" for the two years in question. Such a result, according to the defendant Association, is not that which was contemplated by the law or any case interpreting fair share fee procedures.

The Court finds that the plaintiffs in this action are entitled to a return of all monies determined to be nonchargeable by the impartial decisionmaker for the years 1985-86 and 1986-87 as to the plaintiff Lowary, and 1985-86 only as to the plaintiff Sara Wyatt. The return of the nonchargeable monies must include interest. The Court agrees with the defendant and finds that to permit a full refund of all monies would allow the plaintiffs a free ride for the two years in question.

The plaintiffs seek a declaratory judgment on three separate items. First, a judgment declaring the 1985-86 and 1986-87 plans unenforceable and void because they violate the constitutionally protected rights of the plaintiffs. Second, that the rebate procedures utilized in the two years in question were unconstitutional. Third, a declaration that Ohio Rev.Code § 4117.09 is unconstitutional.

To the extent the Court found the 1985-86 and 1986-87 plans unconstitutional, the Court declares that such plans are unenforceable and in violation of the first and fourteenth amendment rights of the plaintiffs as indicated in the Court's Memorandum Opinion of October 21, 1987. The Court declines, however, to declare that the Ohio Rev.Code § 4117.09 is unconstitutional given the Court's rejection of the plaintiffs' challenge to the constitutionality of the statute.

The plaintiffs seek an award for compensatory damages under § 1983. The Court declines to award the plaintiffs compensatory damages because no evidence was presented regarding such damages and the plaintiffs have failed to come forward in their briefs and specifically state the basis for the claims. The parties submitted the case to the Court on stipulated facts and

the Court finds that there are no facts that would warrant an award of compensatory damages. Similarly, the Court declines to award the plaintiffs punitive damages under § 1983. The plaintiffs have failed to establish that the defendants' conduct was motivated by evil motive or intent. *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983).

The plaintiffs also seek an award of nominal damages and claim that they are entitled to nominal damages under *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978). In *Carey* the Supreme Court found that nominal damages are appropriate for relief from constitutional violations when there is an absence of actual damage. *Carey*, 435 U.S. at 266, 98 S.Ct. at 1053-54; *see also, Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 308 n. 11, 106 S.Ct. 2537, 2544 n. 11, 91 L.Ed.2d 249 (1986). The defendants argue that the plaintiffs are not entitled to nominal damages because the nonmembers will receive a refund of their nonchargeable fee with interest.

The Court finds that the plaintiffs are entitled to nominal damages. Neither plaintiff has established actual damages and yet a constitutional violation has occurred. *Carey*, 435 U.S. at 266, 98 S.Ct. at 1053-54. Thus, the Court finds that the plaintiff Lowary is entitled to nominal damages not to exceed one dollar per year for the year 1985-86 and 1986-87. Further, the plaintiff Wyatt is also entitled to nominal damages not to exceed one dollar for the year of 1986-87.

In sum, the Court concludes that in terms of relief, the plaintiffs are entitled to a declaration that the plans in effect for 1985-86 and 1986-87 are unenforceable and in violation of the plaintiffs first and fourteenth amendment rights as indicated in the Memorandum Opinion of October 21, 1987. Furthermore, the plaintiffs are entitled to a return of those expenses that were determined nonchargeable by the impartial decisionmaker for the years in question with interest. The plaintiff Lowary is entitled to nominal damages not to exceed one dollar per year for the year 1985-86 and 1986-87, and the plaintiff Wyatt is also entitled

to nominal damages not to exceed one dollar for the year of 1986-87.

The plaintiffs make a claim for attorney fees under § 1983 and the defendants do not oppose the plaintiffs' general entitlement to attorney's fees.

V. LEXINGTON LOCAL BOARD OF EDUCATION'S CROSS COMPLAINT AGAINST THE DEFENDANT ASSOCIATION.

On November 6, 1987, the defendant Lexington Local Board of Education filed a cross claim against the defendants Lexington Teachers Association and the Ohio Education Association. On December 21, 1987, the Lexington Teachers Association and the Ohio Education Association answered the cross claim of Lexington Board of Education.

The plaintiffs now move the Court to intervene in the cross complaint filed by the Lexington Local Board of Education (Board) against the Lexington Teachers Association and the Ohio Education Association (collectively referred to as Association). The plaintiffs move to intervene in the cross claim as a matter of right, pursuant to Rule 24(a)(2), Fed.R.Civ.P., and alternatively for permissive intervention pursuant to Rule 24(b)(2), Fed.R.Civ.P.. The Board and the Association both oppose the plaintiffs' motion to intervene. For the reasons that appear below, the Court denies the plaintiffs' motion to intervene the cross complaint.

The Board's cross complaint against the Association essentially seeks indemnification from the Association for any liability imposed upon the Board as a result of the fair share fee collection under the collective bargaining agreement between the Association and the Board. The Board seeks indemnification against the Association on a number of theories and specifically the Board seeks indemnification under the collective bargaining agreement, Article IV of the year 1986-87, wherein the Board contends that the Association agreed to indemnify it for liability

arising out of the fair share fee deduction. The Association denies that they are under a duty to indemnify the union under any of the asserted basis.

The plaintiffs' primary argument in support of their motion to intervene in the cross complaint is that they have a strong interest in arguing against the Board's claim of indemnification because the plaintiffs believe the Board should not be able to contract away its constitutional responsibility to the plaintiffs.

Rule 24 provides:

> [u]pon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P. 24(a). The plaintiffs claim that they have an interest in the property or transaction of the cross complaint and that the disposition of the cross complaint would impede its ability to protect their interest. The Association and the Board argue that the plaintiffs do not have a sufficient interest in the cross claim and that their interests are adequately protected by the present party.

The Court finds that the plaintiffs have failed to establish that they are entitled to intervene in the Board's cross complaint against the Association as a matter of right. The Association contends, and the Court agrees, that the plaintiffs have no interest in the relationship between the Association and the Board. The plaintiffs' interest, i.e., their constitutional rights, have been fully litigated in the main action and the appropriate relief has been awarded against both the Board and the Union.

The only interest that the plaintiffs have in the cross complaint is one that was already argued in the underlying action, i.e., that the Board should bear some responsibility for the implementation of constitutionally deficient plans. The Court has already addressed that issue and has concluded that the Board does maintain some responsibility for a constitutionally adequate plan. Accordingly, the Court finds that the interest claimed in the cross complaint by the plaintiffs is one that has already been litigated in the underlying action and the plaintiffs have no substantial interest in the contractual relationship between the union and the Association's post-liability determination.

Furthermore, the Court finds that plaintiffs' claimed interest is adequately protected by the Association. The Association has denied liability on the Board's cross claim which is essentially the position that the plaintiffs would assert. The Court finds that the defendant Association will more than adequately protect the interests of the plaintiffs because it is the Association which will bear the ultimate liability upon the successful prosecution of the cross complaint. In comparison, the plaintiffs have no real interest in terms of liability nor is their claim for relief dependent upon the cross complaint.

Accordingly, the Court finds that the plaintiffs' motion to intervene in the cross complaint as a matter of right is denied. The Court also declines to permit the plaintiffs to intervene in the cross complaint on the basis of permissive intervention under Rule 24(b)(2) as the plaintiffs have failed to establish grounds for permissive intervention. The plaintiffs have merely sought permissive intervention as an alternative to intervention as a right and has not actively pursued such a claim. Accordingly, the Court declines to permit intervention on a permissive basis.

VI. CONCLUSION.

For the reasons that appear above:

1. The plaintiffs' motion for partial reconsideration of the memorandum opinion issued on October 21, 1987, docket # 131, is denied.

2. The defendant Ohio Education Association's (OEA) motion for partial reconsideration of the October 21, 1987 memorandum opinion, docket # 134, is granted. To the extent that the memorandum opinion of October 21, 1987 held that *Tierney* requires the independent auditor to make an initial determination of chargeability, that holding is vacated. The Court finds that *Hudson*, *Tierney*, and *Damiano*, only require that the independent auditor, at the audit stage, verify the union's calculations and expenditures. The propriety of the chargeability decision by the union is a decision left for the impartial decision-maker. The Court further finds that final holding of October 21, 1987 is not disturbed by the Court's reconsideration of the auditor's role. The Court previously found numerous other constitutional deficiencies in the relevant plans rendering them constitutionally inadequate notwithstanding the Court's present reconsideration.

3. The Court finds that the OEA's proposed fair share fee procedure for the year 1987-88 meets the minimum standards of the first and fourteenth amendments, provided that the language regarding the exhaustion of remedies under the plan is omitted and notice of the omission is served upon all nonmembers and members.

4. In terms of relief, the Court concludes that the plaintiffs are entitled to a declaration that the plans in effect for 1985-86 and 1986-87 are unenforceable and in violation of the plaintiffs first and fourteenth amendment rights as indicated in the Memorandum Opinion of October 21, 1987. Furthermore, the plaintiffs are entitled to a return of those expenses that were determined nonchargeable by the impartial decisionmaker for the years in question with interest. The plaintiff Lowary is entitled to nominal damages not to exceed one dollar per year for the year 1985-86 and 1986-87, and the plaintiff Wyatt is also entitled

to nominal damages not to exceed one dollar for the year of 1986-87.

The process of determining an award of attorneys' fees will be decided after the Court has an opportunity to discuss the matter with counsel.

5. The plaintiffs' motion to intervene in the cross complaint filed by the Lexington Local Board of Education against the Lexington Teachers Association and the Ohio Education Association, docket # 140, is denied.

6. The Court will conduct a status call on March 22, 1988 at 8:00 a.m. to discuss the following matters: (a) the determination of the procedure for resolving the fee application; and (b) the Board's cross complaint against the Association. A separate notice of the status call will be sent to counsel in addition to this order.

IT IS SO ORDERED.

APPENDIX 1

OEA

FAIR SHARE FEE ADVANCE REDUCTION PROCEDURE

I. GENERAL STATEMENT

This procedure shall be effective for the 1987-88 membership year and thereafter. This procedure applies where a local affiliate of the Ohio Education Association (OEA) is the exclusive bargaining representative for the employees of a bargaining unit. In this procedure, the local association, together with the affiliated district association, the Ohio Education Association, and the National Education Association, will be referred to as "the Association."

Many bargaining agreements between a local association and an employer require that bargaining unit employees either join the Association or pay a fair share fee to defray the cost of representing the employees. The amount of the fee is based upon the Association's expenditures for the preceding membership year. Under Ohio law, employees who choose not to join the Association may elect to not pay the portion of their fair share fees based upon Association expenditures in support of partisan politics or ideological causes not germane to the work of the Association in the realm of collective bargaining. To elect not to pay that portion, the non-member must file a written objection according to the procedure outlined below. The failure to file an annual written objection in a timely manner will preclude the non-member from electing not to pay that portion for that membership year.

II. PROCEDURE FOR ANNUALLY ELECTING NOT TO PAY FULL FAIR SHARE FEE

A. NOTICE OF FAIR SHARE FEE AND PAYROLL DEDUCTION

At the beginning of each school year, the Association will post notices at each place of employment indicating that the collective bargaining agreement with the employer requires each bargaining unit employee to either become a member of the Association or to pay a fair share fee. The notice will also indicate the amount of the fair share fee, and the date when the fair share fee will first be deducted from the employee's pay. The first deduction of the fee will not occur prior to January 15th. The notice shall substantially conform to the model attached as Appendix A.

B. EXPLANATION OF FAIR SHARE FEE

Not later than December 15th of each year, the Association will send each non-member an explanation of the basis for the

fair share fee to enable the non-member to gauge the propriety of that fee. That explanation will include:

(1) A list of expenditures made by the Association, by major category, during the preceding year verified by an independent auditor; and an identification of whether the major category of expense, or a particular portion thereof, is chargeable to objectors;
(2) The proportion of the fair share fee that is chargeable to objectors under applicable law;
(3) The method used to calculate the chargeable proportion;
(4) A copy of this procedure.

The explanation will be sent to the non-member's home address by first class mail. An employee who enters the bargaining unit after the explanations have been sent, and who elects not to join the Association, will promptly be provided the explanation after entry into the bargaining unit.

C. OBJECTION

Any non-member who elects not to pay the full fair share fee must file a written objection with the Ohio Education Association (OEA), at P.O. Box 2550, 225 East Broad Street, Columbus, Ohio 43216, either by mail or by personal delivery. Objections must include the objector's name, home address, and place of employment. An objection will be considered timely only if postmarked or actually received by the OEA on or before January 15th. An objection from an employee who received the explanation described in subsection B above *after* the general distribution will be timely if postmarked or actually received by the OEA on or before thirty days after the explanation was mailed.

The objection may be phrased in general terms and need not identify any particular expenditures to which the non-member specifically objects.

After receiving the objections, but before fair share fee deductions begin, the Association will send the non-chargeable portion of the full year's fair share fee to each objector as the advance reduction of the annual fee. At the same time, the Association will place an amount equal to the chargeable portion and the portion, if any, that may reasonably be in dispute, of the full year's fair share fee in an interest-bearing escrow account established by the OEA with an escrow agent. Thereafter, objectors will be responsible for paying the full year's fair share fee either by periodic payroll deduction or self-payment.

Objectors who are in the bargaining unit for only a portion of the school year shall only be responsible for a pro rata share of their fair share fee.

D. APPEAL TO IMPARTIAL DECISIONMAKER

The OEA shall annually ask the American Arbitration Association (AAA) to appoint an impartial arbitrator from its special panel of labor arbitrators experienced in this field. The OEA will provide the AAA with the names, addresses and place of employment of all timely objectors, and any other information requested by the AAA.

All timely objections will be consolidated into one hearing per year, which may not be waived by the Association, and which shall be held in Columbus, Ohio, at a location and on a date determined by the arbitrator.

Except as otherwise provided here, all matters relating to the arbitration proceeding shall be in accordance with the "AAA Rules for Impartial Determination of Union Fees," a copy of which is attached as Appendix B.

After the hearing, the arbitrator shall determine the proportion of the fair share fee that is chargeable to non-members under applicable law. The arbitrator shall issue the decision and determination not later than thirty (30) days from the closing of the hearing but in no event later than June 15th, and submit

copies to the OEA and to each objector. The percentage of chargeable expenditures by local and district associations will be presumed by the arbitrator to be whatever percentage is found to be appropriate for chargeable OEA expenditures. Since the local and district associations spend a significantly larger percentage of their budgets on chargeable expenditures, this presumption means that objectors will be charged less than they lawfully could be charged.

After the arbitrator's decision, the Association shall direct the disbursement of all funds in the escrow account, including interest, to the proper parties in accordance with that decision.

III. APPEAL: OBLIGATION TO EXHAUST REMEDIES

The objectors and/or Association may challenge the arbitrator's decision, pursuant to law, but such challenge, if successful, shall not result in a fair share fee greater than that determined by the arbitrator.

Any objector must exhaust the remedies provided by this procedure, and by law, before seeking judicial review of any issues capable of resolution under this procedure.

APPENDIX A

SPECIMEN NOTICE

(To be posted in prominent places throughout the work place at the beginning of each membership year)

To all employees in the bargaining unit represented by the ___ _____(1)_____.

The labor agreement between the Employer and the Association requires all members of the bargaining unit to become and remain members of the Association or to pay a fair

share fee to the Association. If you do not voluntarily join the Association, you must pay the fair share fee.

The amount of the fair share fee for the (2) school year is $ (3) and if paid by payroll deduction, the first deduction will occur (4).

The Association, through its parent organization the Ohio Education Association, has adopted an internal procedure to provide for an advance reduction of the non-chargeable portion of the fair share fee to fee payors who timely object. All fair share fee payors will be notified by the Ohio Education Association by December 15th of how the fair share fee was calculated and provided a copy of the internal procedure.

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(1) Name of affiliated local association.

(2) Insert the appropriate school year, i.e., "1987-88."

(3) Insert the dollar amount of the UEP dues unless the locally negotiated agreement specifies a lesser amount or less than 100% of UEP dues.

(4) Specify pay date or payroll period when the first deduction is to occur, which shall not be prior to January 15th.

APPENDIX F

ORDER ON MOTIONS FOR RECONSIDERATION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

November 18, 1988

William LOWARY, et al., Plaintiffs,

v.

LEXINGTON LOCAL BOARD OF EDUCATION, et al., Defendants.

No. C86-1536A.

United States District Court,
N.D. Ohio, E.D.

Nov. 18, 1988.

ORDER

DOWD, District Judge.

I. INTRODUCTION.

Before the Court in the above-captioned case is the defendant Association's second motion for partial reconsideration (docket # 184), and the plaintiffs' motion for a partial reconsideration (docket # 188).

This is a § 1983 action brought by the plaintiffs challenging the fair share fee provisions of the collective bargaining agreement between the Lexington Local Board of Education, the defendant Lexington Teachers' Association and the Ohio Education Association ("OEA"). The case has a long history with this Court and has resulted in two major decisions by the Court. The first decision by the Court was issued on October 21, 1987 (docket # 129) ("*Lowary* I") 704 F.Supp. 1430 and the second was issued on March 2, 1988 (docket # 172) ("*Lowary* II"), 704 F.Supp. 1456. In the first opinion the liability of the defendants was at issue. In the second opinion, the Court addressed post-judgment motions and the question of whether the OEA's new fair share fee procedure established as a result of the Court's decision in *Lowary* I met the constitutional minimal

standards. The parties are now back before this Court with the above two motions seeking reconsideration of the combined decisions of the Court.

For the reasons that appear below, the defendants' second motion for partial reconsideration is granted and the plaintiffs' motion for reconsideration is denied.

II. DEFENDANT ASSOCIATION'S SECOND MOTION FOR PARTIAL RECONSIDERATION.

In the Court's Memorandum Opinion of October 21, 1987 ("*Lowary* I") the Court examined the defendants' fair share fee procedures for three separate academic years: 1984-1985; 1985-1986; and 1986-1987. The Court concluded that the plaintiffs' claims of alleged constitutional violations under § 1983 were time barred for the academic year 1984-1985. *Lowary* I, at p. 1443. The Court, however, found that *Chicago Teachers Union, Local No. 1 AFT, AFL-CIO v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) and *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987) had retroactive application to the 1985-1986 fair share fee plan and concluded that the plan for that academic year was constitutionally deficient. *Lowary* I, at p. 1445. The Court also found that the fair share plan for the 1986-1987 year was constitutionally deficient. *Lowary* I, at p. 1447.

In the defendants' second motion for partial reconsideration, the defendant argues that the Court should not have retroactively applied *Hudson* and *Tierney* to the 1985-1986 academic year.

In *Lowary* I the Court recognized that the law in the Sixth Circuit with respect to retroactivity was unsettled and examined the Sixth Circuit's decisions in *Gurish v. McFaul*, 801 F.2d 225 (6th Cir.1986) and *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir.1984) (*en banc*). The Court recognized that *Gurish* and *Smith* stood for the proposition that where the Supreme Court was silent on the issue of retroactivity, it would be presumed that the Supreme Court intended the rule or principle of law to have retroactive application. *Lowary* I, at p. 1443. At the same time,

the Court recognized the Sixth Circuit's decision in *Carter v. City of Chattanooga*, 803 F.2d 217 (6th Cir.1986) where the Sixth Circuit applied the retroactivity factors established in *Chevron v. Hudson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971). The Court concluded that

> [d]espite the apparent conflict in the Sixth Circuit, the Court will apply *Hudson* retroactively to the plaintiffs' claims based on the 1985-1986 school year rebate plan. First, *Smith*, the case on which *Gurish* was based, was an *en banc* decision of the Sixth Circuit, and thus entitled to greater consideration than apparently contradictory panel decision [i.e., *Carter*]. Second, the Court notes that the Sixth Circuit recently applied *Hudson* retroactively. *See Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir.1987). Thus, *Hudson* applies to the plaintiff's claims based on the 1985-1986 school year rebate procedure.

Lowary I, pp. 1443-1444. While the Court specifically found that *Hudson* had retroactive application, the Court also relied on *Tierney* in its review of the 1985-1986 rebate plan thus giving *Tierney* retroactive application also. *See*, *Lowary* I, at pp. 1444-1446.

The defendant Association argues that the Sixth Circuit's recent decision in *Carter v. City of Chattanooga*, 850 F.2d 1119 (6th Cir.1988) makes it clear that when determining whether a principle of law is to be applied retroactively, the factors announced in *Chevron v. Huson*, 404 U.S. 97, 92 S.Ct. 349, 30 L.Ed.2d 296 (1971) are to be used. The defendant argues that had the Court conducted the *Chevron* analysis in *Lowary* I, it would have concluded that *Hudson* and *Tierney* could not be retroactively applied to the 1985-1986 procedure.

In *Carter v. City of Chattanooga, Tenn.*, 850 F.2d 1119 (6th Cir.1988), the Sixth Circuit relied upon the three-part analysis in *Chevron* in determining whether to apply the Supreme Court's decision in *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85

L.Ed.2d 1 (1985) to the facts of *Carter*.[1] The Sixth Circuit concluded that "we expressly adopt the reasoning of *Thomas v. Shipka* to the effect that the holding of *Smith v. General Motors* is no longer valid. Accordingly, we have applied the test of non-retroactivity established in *Chevron Oil. ...*" *Carter*, 850 F.2d at 1133. In *Thomas v. Shipka*, 829 F.2d 570 (6th Cir.1987), the Sixth Circuit concluded that *Smith* could no longer be the law of the circuit in the area of retroactive application in view of the Supreme Court's decision in *St. Francis College v. Al-Khazraji*, 481 U.S. 604, 107 S.Ct. 2022, 95 L.Ed.2d 582 (1987), and in *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 107 S.Ct. 2617, 96 L.Ed.2d 572 (1987).

In view of *Carter v. City of Chattanooga, Tenn.*, 850 F.2d 1119 (6th Cir.1988), the Court finds that the proper test for determining whether a decision is to be given retroactive application is that enunciated in *Chevron*. Accordingly, the Court finds that its application of the *Smith-Gurish* rule in *Lowary* I was inappropriate and the Court now turns to a consideration of the factors enunciated in *Chevron*.

In *Chevron*, the Supreme Court recognized three general factors to be considered when making the determination of whether a new principle of law should be applied retroactively. Generally, the three factors are: (1) whether the decision to be applied retroactively has established a new principle of law "either by overruling clear past precedent on which litigants may have relied, ..., or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) whether the application of the decision would further the operation of the new principle of law and its goals; and (3) the balance of the inequities imposed by the retroactive application. *Chevron*, 404

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[1]The decision in *Carter* cited at 850 F.2d 1119 was the second time that *Carter v. City of Chattanooga, Tenn.* was before the Sixth Circuit. While the Sixth Circuit applied the *Chevron* factors in the first decision, the Court did not as clearly enunciate its justification for the application of *Chevron* as opposed the application of *Gurish* and *Smith* as it did in the later *Carter* decision.

U.S. at 106-107, 92 S.Ct. at 355. The threshold question, notwithstanding the three separate factors, is whether the principle of law newly established either overrules clear past precedent on which litigants have relied or whether the issue decided is one of first impression whose resolution was not clearly overshadowed. *United States v. Johnson*, 457 U.S. 537, 550 n. 12, 102 S.Ct. 2579, 2587 n. 12, 73 L.Ed.2d 202 (1982).

The defendant Association argues that there were a number of new principles of law established in *Hudson* that were not clearly foreshadowed or decided prior to the date of *Hudson*. The defendant argues that the following aspects of *Hudson* were all new additions to the issue of fair share fee collections: (1) the requirement of an impartial decision maker and the requirement that the union not select the impartial fee umpire; (2) that the union be required to make a financial disclosure prior to the opportunity to object; and (3) that in *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 466 U.S. 435, 104 S.Ct. 1883, 80 L.Ed.2d 428 (1984), the Supreme Court gave approval to the interest bearing escrow accounts as acceptable alternatives to collection and that such an alternative was eliminated in *Hudson*. The defendants also argue that the district court's approval of the unions procedure in *Tierney* is support from the proposition that the defendant was entitled to rely on that precedent before *Hudson*.

The plaintiffs argue that the defendant was on notice that their procedures were defective in view of the Seventh Circuit's decision in *Hudson v. Chicago Teachers Union*, 743 F.2d 1187 (7th Cir.1984), *aff'd*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986) because it was issued in 1984. Moreover, the plaintiffs argue that the Supreme Court in *Hudson* did not establish any new principles of law but was instead forecasted or foreshadowed by the decision of the Supreme Court in *Abood v. Detroit Board of Education*, 431 U.S. 209, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977). The plaintiffs rely on concurring opinion of Justice Stevens for the proposition that "the OEA/LTA union can hardly claim that they could not possibly see the 'handwriting on the wall' in light of Justice Stephens' prescient language *eleven*

years ago." Plaintiffs' Memorandum of Law in Opposition to Defendants' Second Motion for Partial Reconsideration, p. 3 (emphasis in original).

The Court finds that both *Hudson* and *Tierney* established new principles of law at the time the decisions were issued. The Court agrees with the defendants and finds that both *Hudson* and *Tierney* narrow the focus of that which was presented in *Abood* and set new principles for the specific operation of fair share fee collections.

The decision in *Hudson* was decided on March 4, 1986. The decision in *Tierney* was decided on July 27, 1987. The earliest action taken in the 1985-1986 school year began on or about June 27, 1985 when the Lexington Teachers Association notified the school board of the fair share fee amount. Stipulated Fact # 31. The fair share fee plan in effect for the 1985-1986 year was identical to that in the 1984-1985 year. *See* Stipulated Fact # 30 and # 5. It is clear that the defendant Association's fair share fee plan in effect for the 1985-1986 school year was implemented substantially prior to the announced decision of *Hudson* in March of 1986 and *Tierney* decision announced in July of 1987. Accordingly, when the rebate plan for 1985-1986 was under consideration the Association did not have before it either *Hudson* or the Sixth Circuit decision in *Tierney*.

The defendant claims that it was entitled to rely on the district court's endorsement of the union's rebate plan in *Tierney* because the rebate plan in question here was substantially similar. The Court noted in *Lowary* I that "the OEA plan is remarkably similar to the City of Toledo procedure declared unconstitution in no uncertain terms of the Sixth Circuit in *Tierney*." *Lowary* I, at p. 1446. The Court recognizes that a district court decision cannot be said to be clear precedent but it does highlight the developing nature of fair share fee principles.

In sum, the Court finds that although there was no clear precedent established in fair share fee cases prior to *Hudson* and *Tierney*, the decisions of *Hudson* and the Sixth Circuit decision in

Tierney clearly establish issues of first impression on the specific requirements of fair share fee collections. Moreover, the Court finds that neither *Abood* or the Seventh Circuit's decision in *Hudson*, 743 F.2d 1187, foreshadowed the holdings of *Hudson*, 475 U.S. 292, 106 S.Ct. 1066, and *Tierney*. Accordingly, the Court finds that the first factor in the *Chevron* analysis falls in favor of the defendant association and in favor of the prospective application of *Hudson* and *Tierney*.

Turning to the second consideration under *Chevron*, i.e., whether the application of the decision would further the operation of the principles announced in *Hudson* and *Tierney* and its goals, the Court finds that the application of *Hudson* and *Tierney* to the 1985-1986 rebate plan would not further the principles and goals of *Hudson* and *Tierney*.

The defendant argues that the purpose behind the new principles announced in *Hudson* would not be furthered by the retroactive application to the 1985-1986 year. The defendant argues that in each instance, the overall purpose was in fact achieved. For example, the defendant argues that the purpose of the impartial decision maker rule was to prevent union control over the review process. The defendant argues that in fact the impartial decision maker was appointed by the American Arbitration Association and therefore not appointed by the union. Stipulated Fact # 49. Further, the defendant argues that the purpose of the financial disclosure, while admittedly inadequate by later standards, served the purpose of initiating the objection of the plaintiffs. The plaintiffs, on the other hand, simply conclude that the retroactive application of *Hudson* and *Tierney* enhances the application of the principles announced in those decisions.

The Court finds that the application of *Hudson* and *Tierney* to the 1985-1986 rebate plan would not further the principles announced in *Hudson* and *Tierney* because the developing nature of fair share fee rebate plans at the time in question. The Court finds that because of the extent of the principles and detail of those principles announced in *Hudson* and *Tierney*, the purposes

behind those rules would not be served by the retroactive application to a plan that was developed prior to those decisions.

The Court now turns to an examination of the equities of retroactive application. The defendants argue that it should not be penalized for relying on federal and state decisions validating its procedure. While the Court recognizes the constitutional deficiencies of the plan in effect in 1985-1986 in light of more recent standards, the Court also recognizes that there was an attempt by the defendants to have in place a fair share fee provision that complied with the current state of the law. The fact that it was later determined to be a constitutionally deficient plan under the new cases of *Hudson* and *Tierney* does not diminish the association's attempt to comply. The Court recognizes the substantial rights of the plaintiffs in this action, however, the Court finds that the plaintiffs have simply failed to adequately argue before the Court what inequities it would suffer besides concluding "that gross injustice will occur to the plaintiffs, because the unions will then be able to keep the money which they illegally seized." Plaintiffs' Brief at p. 5.

In sum, the Court finds that *Hudson* and *Tierney* should not have retroactive application to rebate procedure in place in the above-captioned case for the academic year 1985-1986. Accordingly, the Court hereby vacates its decision in *Lowary* I to the extent that it found *Hudson* and *Tierney* applicable to the 1985-1986 fair share fee plan. Similarly, the Court vacates its decision in *Lowary* II (March 2, 1988 Order) to the extent that it ordered relief for constitutional violations under the 1985-1986 plan. The Court finds that the alleged violations brought by the plaintiffs in regards to the plan in effect for 1985-1986 are time barred.

III. PLAINTIFFS' MOTION FOR RECONSIDERATION.

The plaintiffs seek reconsideration of the Court's portion of the March 2, 1988 order ("*Lowary* II") wherein the Court declined to award a complete restitution of all the agency fees collected as a result of the 1985-1986 and 1986-1987 academic

years. The plaintiffs' motion is based upon the Sixth Circuit's decision in *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (1988). In *Lowary*, 854 F.2d 131, the Sixth Circuit Court of Appeals reviewed this Court's decision to require the defendant union to escrow all the fair share fee pending a resolution on the merits of this case. The Sixth Circuit reversed and ordered that the fair share fees collected and placed in escrow be returned. The plaintiffs argue that "the Court's order of March 2, 1988, denying plaintiffs' request for complete restitution of *all* illegally seized fees is erroneous as a matter of law under the Sixth Circuit's decision in *Lowary v. Lexington Local Board of Education*...." Plaintiffs' Motion for Partial Reconsideration, at p. 1 (emphasis in original).

The Court finds that the plaintiffs' reliance on *Lowary*, 854 F.2d 131 is misplaced. The Sixth Circuit's review was limited to whether the escrow of fair share fees collected in view of the Court's preliminary holding that it was likely that the procedures in place violated *Hudson* was permissible. The Sixth Circuit simply concluded that the escrow was not permissible. The focus in *Lowary*, 854 F.2d 131, therefore, was not on the remedy phase once a fair share fee plan has been determined to be unconstitutional. The Court remains committed to its award of relief under the March 2, 1988 order, *Lowary* II, and finds that the plaintiffs' motion for reconsideration is not well taken. Accordingly, the plaintiffs' motion is denied.

IV. CONCLUSION.

For the reasons that appear above, the defendants' second motion for partial reconsideration is granted, and the plaintiffs' motion for reconsideration is denied.

IT IS SO ORDERED.

APPENDIX G

SECTION 4117.09(C)
OF THE OHIO REVISED CODE

OHIO REVISED CODE § 4117.09(C)

(C) The agreement may contain a provision that requires as a condition of employment, on or after a mutually agreed upon probationary period or sixty days following the beginning of employment, whichever is less, or the effective date of a collective bargaining agreement, whichever is later, that the employees in the unit who are not members of the employee organization pay to the employee organization a fair share fee. The arrangement does not require any employee to become a member of the employee organization, nor shall fair share fees exceed dues paid by members of the employee organization who are in the same bargaining unit.

Any public employee organization representing public employees pursuant to Chapter 4117, of the Revised Code shall prescribe an internal procedure to determine a rebate, if any, for nonmembers which conforms to federal law, provided a nonmember makes a timely demand on the employee organization. Absent arbitrary and capricious action, such determination is conclusive on the parties except that a challenge to such determination may be filed with the state employment relations board within thirty days of the determination date specifying the arbitrary or capricious nature of the determination and the state employment relations board shall review the rebate determination and decide whether it was arbitrary or capricious. The deduction of a fair share fee by the public employer from the payroll check of the employee and its payment to the employee organization is automatic and does not require the written authorization of the employee.

The internal rebate procedure shall provide for a rebate of expenditures in support of partisan politics or ideological causes not germaine to the work of employee organizations in the realm of collective bargaining. . . .

No. 90-259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIAM LOWARY and SARA WYATT,
Petitioners,

v.

LEXINGTON TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF RESPONDENTS LEXINGTON TEACHERS ASSOCIATION AND OHIO EDUCATION ASSOCIATION IN OPPOSITION

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QUESTIONS PRESENTED

1. Should this Court review the decision of the court below, which is in accord with the position taken by every other court that has addressed the issue, that petitioners are not entitled to a refund of that portion of their fair share [*i.e.*, agency shop] fees attributable to clearly chargeable activities by respondent unions despite the fact that there were certain defects in the procedure used by the unions to collect said fees?

2. Should this Court review the decision of the court below to allow the refundable portion of petitioners' fair share fees to be determined in the first instance by the impartial decisionmaker provided for in the unions' collection procedure, when petitioners raised only *procedural* challenges and did not challenge the *amount* of the fees, when the impartial decisionmaker aspect of the unions' collection procedure was found to be constitutional in a ruling that is not challenged by petitioners, and when this issue is not significant or likely to recur?

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BRIEF OF RESPONDENTS LEXINGTON TEACHERS ASSOCIATION AND OHIO EDUCATION ASSOCIATION IN OPPOSITION

Respondents Lexington Teachers Association and Ohio Education Association submit this brief in opposition to the Petition for a Writ of Certiorari.

STATEMENT OF THE CASE

A. Background

Petitioners William Lowary and Sara Wyatt were employed as teachers by the Lexington Local Board of Education ("School Board") during the 1985-86, 1986-87, and 1987-88 school years. Pursuant to Ohio law, respondent Lexington Teachers Association ("LTA") was recognized by the School Board as the exclusive collective bargaining representative for a unit consisting of the

teachers employed in the school district. Petitioners were included in this unit, but chose not to join LTA.

During the three years in question, the collective bargaining agreement between the School Board and LTA contained a provision pursuant to which members of the bargaining unit who did not become members of LTA would, in lieu of membership dues, have a fair share (*i.e.*, agency shop) fee deducted from their salaries. In conjunction with this provision, LTA established a collection procedure through which any teacher who objected to paying the full fair share fee could pay a reduced amount.[1] The procedure was revised from year to year as LTA endeavored, in the words of the District Court, "to have in place a fair share fee provision that complied with the current state of the law." Appendix to Petition for a Writ of Certiorari ("Pet. App.") 134a.

In *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986), decided on March 4, 1986, this Court articulated for the first time "the constitutional requirements for [a union's] collection of agency fees." *Id.* at 310. A few weeks later, petitioners filed this action under 42 U.S.C. § 1983, asserting that LTA's procedure for collecting fair share fees did not "comply with the mandate of . . . *Hudson*." Complaint, ¶ 3.

B. Proceedings Below

1. *Procedural Violations*

The courts below ruled that certain aspects of the procedure used by LTA to collect fair share fees from petitioners did not pass muster under *Hudson*, and they fashioned a remedy to deal with the violations. Although

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[1] The procedure was developed by respondent Ohio Education Association ("OEA"), LTA's statewide parent organization, and several aspects of the procedure were administered by OEA. For simplicity in discussion, we will use the term "LTA" to encompass OEA as well as LTA.

the Petition for a Writ of Certiorari relates only to these remedial rulings,[2] there is one aspect of the LTA collection procedure that is relevant to the questions presented —namely, the opportunity afforded objecting feepayers to challenge the amount of the fair share fees before an impartial decisionmaker—and we briefly recount the proceedings below with regard to this aspect.

Under LTA's pre-*Hudson* fair share fee collection procedure, the determination of the portion of the fee to be rebated to objectors as nonchargeable was made by a member of the National Academy of Arbitrators selected by LTA. *See* Joint Stipulation, ¶ 36, and Exhibit 4 thereto at 1-4. Numerous decisions of the lower federal courts had upheld the use of such a selection procedure. *See, e.g., Robinson v. State of New Jersey*, 741 F.2d 598, 613 (3d Cir. 1984), *cert. denied*, 469 U.S. 1228 (1985); *Dolan v. Rockford School District*, No. 84-20209 (N.D. Ill. Aug. 19, 1985); *Kempner v. Dearborn Local 2077*, 337 N.W.2d 354 (Mich. 1983), *appeal dism'd*, 469 U.S. 926 (1984); *Association of Capitol Powerhouse Engineers v. Division of Building and Grounds*, 570 P.2d 1042 (Wash. 1977); *Reid v. United Auto Workers*, 479 F.2d 517 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973). In *Hudson*, this Court took a contrary position, holding that an arbitrator selected through "the Union's unrestricted choice" is not a constitutionally adequate decisionmaker in a union's fair share fee collection procedure. 475 U.S. at 308.

In August 1986, a few months after *Hudson* was decided, LTA adopted a new collection procedure. This procedure was adopted on the advice of counsel, who "advised . . . that the new procedure complied with the *Hudson* decision and other applicable federal law." Joint Stipulation, ¶ 59. The new procedure differed from

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[2] LTA has not filed a cross-petition, and the rulings of the court below as to the merits of LTA's procedure are not at issue in this Court.

the previous one in several respects, including the fact that the arbitrator who would determine the amount of the fee to be charged to objectors was selected not by LTA, but by the American Arbitration Association ("AAA"). *Id.*, ¶¶ 47-49 and Exh. 13 thereto. LTA decided to use this AAA selection process to resolve not only the 1986-87 objections, but also the 1985-86 objections, which still were pending when the new procedure was adopted. Joint Stipulation, ¶¶ 47-49, 59. The District Court held that the use of the AAA to select an arbitrator satisfied constitutional requirements, Pet. App. 70a, and this ruling was not challenged on appeal.[3]

2. *Refund Rulings*

The rulings of the court below that are the subject of the Petition for a Writ of Certiorari relate to petitioners' request for a full refund of all fair share fees collected from them for the 1985-86 and 1986-87 school years. Although it was undisputed that LTA had engaged in many activities for which petitioners lawfully could be charged, petitioners argued that because there were certain defects in the procedure that was used by LTA to collect their fair share fees, LTA should be required to return the entire amount collected, with the result that petitioners would pay no fees at all for the years in question. The District Court rejected this argument, directing LTA to refund only the nonchargeable portion of the fees collected. The court ruled, moreover, that the amount to be refunded should in the first instance be as determined by the AAA-selected arbitrator under the LTA collection procedure. Pet. App. 115a-116a, 134a-135a.

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[3] On November 9, 1987, in response to the July 1987 decision of the Sixth Circuit in *Tierney v. City of Toledo*, 824 F.2d 1497 (6th Cir. 1987), LTA revised its collection procedure once again to comply with that decision. The impartial decisionmaker aspect of the LTA collection procedure was not changed as a result of *Tierney*. Pet. App. 101a.

The Sixth Circuit affirmed the District Court's rulings on the refund question, stating that its "primary concern" was that "awarding total restitution to plaintiffs will undermine the policy concerns of *Abood* [*v. Detroit Board of Education*, 431 U.S. 209 (1977)]" because "[one] objective of *Abood* . . . is 'to require every employee to contribute to the cost of collective-bargaining activities.'" Pet. App. 19a, quoting 431 U.S. at 237. Noting that "*Hudson* leaves undisturbed the traditional rule that the proper remedy for an unconstitutional fee collection is not a refund of the total fee, but 'the refund . . . of a portion of the exacted funds in the same proportion that union [chargeable] expenditures bear to total union expenditures,'" Pet. App. 19a, quoting *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), the court below pointed out that "the *Hudson* Court refused to rule that a complete escrow was required after an objection precisely because '[s]uch a remedy has the serious defect of depriving the Union of access to some . . . funds that it is unquestionably entitled to retain.'" Pet. App. 19a, quoting *Hudson*, 475 U.S. at 310.

The Sixth Circuit also rejected petitioners' contention that a total-refund remedy is required in order to deter future violations of the procedural rights established in *Hudson*. The court observed that "[t]his argument in favor of full recovery was rejected in both *Carey v. Piphus*, 435 U.S. 247 . . . (1978), and *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 . . . (1986)." Pet. App. 19a. "Specifically, the Supreme Court held that '[t]o the extent . . . Congress intended that [the] awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages.'" Pet. App. 19a-20a, quoting *Carey*, 435 U.S. at 256-57.

The court below therefore concluded:

> If lawful collection procedures had been used, plaintiffs would have had to pay a fair share fee based on

> the union's chargeable expenditures. To allow plaintiffs to recover for both chargeable and nonchargeable expenditures would constitute a windfall to plaintiffs. [Pet. App. 20a].

Finally, the Sixth Circuit held that it was not improper for the District Court to have based the chargeable amount of the fair share fees for the years in question on the decision of the arbitrator under the LTA collection procedure. The Sixth Circuit noted that "[i]n this case . . . , plaintiffs do not claim that the decisionmaker's determinations were improper." Pet. App. 20a-21a. "Rather, plaintiffs only object to the use of the procedure," *id.* at 21a; and the aspect of the LTA procedure that was used to determine the chargeable amount (*viz.*, a decision by an arbitrator selected by the AAA) had been approved as constitutional by the District Court in a ruling petitioners did not challenge on appeal. *Id.* The court below acknowledged, however, that the arbitrator's determination "would not receive preclusive effect in a subsequent § 1983 action," Pet. App. 20a, quoting *Hudson*, 475 U.S. at 308 n.21.

REASONS FOR DENYING THE WRIT

Petitioners' demand for a total refund of their fair share fees is squarely at odds with the general remedial principles that this Court has held to be applicable in every § 1983 case, as well as with this Court's specific holdings in fair share fee cases that remedies should not result in objectors receiving a "free ride." Nor is there any conflict in the lower courts on this question. Part I, *infra*. Petitioners' contention that the District Court should itself have made the determination of the chargeable amount is likewise without merit: it ignores the fact that petitioners did not in this lawsuit challenge the *amount* of the fair share fees but only LTA's *procedures*, and none of the procedures found to be unlawful had any impact on the arbitrator's calculation of the chargeable amount. Moreover, because this question is neither sig-

nificant nor likely to recur, it does not in any event warrant review by this Court. Part II, *infra*.

I. THE SIXTH CIRCUIT'S REFUSAL TO REQUIRE A TOTAL REFUND OF PETITIONERS' FAIR SHARE FEES WAS CLEARLY CORRECT UNDER THIS COURT'S DECISIONS, AND PRESENTS NO CONFLICT WITH OTHER LOWER COURT RULINGS

A. The principle that governs remedies in § 1983 cases is that monetary relief may be awarded only "to *compensate* persons for injuries *caused by* the deprivation of [constitutional] rights." *Carey v. Piphus*, 435 U.S. 247, 255 (1978). *Accord, Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986). The proper application of this principle in the present context—*i.e.*, where a plaintiff who has been deprived of liberty or property without proper procedures demands restitution of what was taken—was settled in *Carey*: a court should not order the liberty or property to be restored to the plaintiff if the deprivation would have occurred even had proper procedures been followed, for "in such a case, the failure to accord [proper procedures] could not properly be viewed as the cause of the [deprivation]." *Carey*, 435 U.S. at 260. *See also Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 285-87 (1977).

It is undisputed, as the Sixth Circuit noted, that "[i]f lawful collection procedures had been used, plaintiffs would have had to pay a fair share fee based on the union's chargeable expenditures." Pet. App. 20a. Thus, to require a refund of the chargeable portion of the fair share fees "would constitute a windfall to plaintiffs," *id.*, and such a remedy is precluded by *Carey* and *Stachura*.

Petitioners' assertion that only a full refund would "avoid recurrences of the unions' repeated unconstitutional conduct," Pet. at 8, is wide of the mark, given the District Court's finding that LTA endeavored at all times "to have in place a fair share fee provision that com-

plied with the current state of the law." Pet. App. 134a.[4] And in any event, as the Sixth Circuit pointed out, this very argument was rejected in both *Carey* and *Stachura*, where this Court held that "[t]o the extent that Congress intended that awards under § 1983 should deter the deprivation of constitutional rights, there is no evidence that it meant to establish a deterrent more formidable than that inherent in the award of compensatory damages"—*i.e.*, damages for injuries actually caused by the violation. *Carey*, 435 U.S. at 256-57. *See also Stachura*, 477 U.S. at 310.[5]

B. The windfall sought by petitioners would be especially inappropriate here, because it would provide precisely what fair share fee arrangements are intended to prevent—namely, a "free ride" for objectors. As this Court has stated, such arrangements serve "important government interests," *Abood*, 431 U.S. at 225, by "requiring employees who obtain the benefit of union representation to share its cost," *id.* at 219, thereby "distribut[ing] fairly the cost of [representational] activities among those who benefit, and . . . counteract[ing] the incentive that employees might otherwise have to become 'free riders'—to refuse to contribute to the union while obtaining benefits of union representation that necessarily accrue to all employees," *id.* at 222. In this case, petitioners have "obtain[ed] benefits of union representation that necessarily accrue[d] to all employees"

[4] LTA's inability to predict the ever-changing legal landscape in this field hardly bespeaks an intent to violate the law. *See supra* at 3. Moreover, the District Court explicitly found that petitioners had presented no evidence to support an award either of compensatory damages (beyond the return of the nonchargeable portion of the fees collected) or punitive damages. Pet. App. 115a-116a, and those findings were not challenged on appeal.

[5] Of course, *punitive* damages are available under § 1983 upon a proper showing, *see Smith v. Wade*, 461 U.S. 30 (1983), but petitioners do not challenge the District Court's finding that no such showing was made in this case. *See supra* note 4.

in each of the years in question. By insisting that they should be allowed "to refuse to contribute to the union" for those years, petitioners ignore totally the important public interests recognized in *Abood*.

Hudson is particularly instructive with regard to the question of remedy. In *Hudson*, this Court stated that "the objective" in a fair share case is not only "to devise a way of preventing compulsory subsidization of ideological activity by employees who object thereto," but to do so "*without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*" 475 U.S. at 302 (emphasis added), quoting *Abood*, 431 U.S. at 237. *Hudson* applied that very principle when it held that a union should not be required to escrow an objector's entire fee because "such a remedy has the serious defect of depriving the Union of access to some . . . funds that it is unquestionably entitled to retain." 475 U.S. at 310. Petitioners' proposed remedy, which calls for a 100% *refund* rather than a 100% *escrow*, suffers from that same defect to an even greater degree. In short, *Hudson* reaffirms the prior decisions in which this Court squarely has held that where a union has not complied with the legal requirements applicable to fair share fees, the proper remedy is not a refund of the total fee, but "the refund . . . of a portion of the exacted funds in the same proportion that union [nonchargeable] expenditures bear to total union expenditures." *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963). *Accord, Machinists v. Street*, 367 U.S. 740, 775 (1961). *See also Abood*, 431 U.S. at 238-42.[6]

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[6] In their Petition at 8-9, petitioners assert that "an agency shop is a creature of statute and contract only," and that a union's interest in collecting fair share fees is a "mere contractual claim" that should be given no consideration in fashioning a remedy. Petitioners overlook that this "mere contractual claim" serves important government interests, and that this Court repeatedly has admonished against the fashioning of remedies that fail to take account of those interests.

C. Petitioners' assertion that the lower courts are divided on this issue, *see* Petition at 10-12, is fanciful. Their contention that the Sixth Circuit's decison conflicts with that court's prior decision in this same case, *see* Petition at 11, citing *Lowary v. Lexington Board of Education*, 854 F.2d 131 (6th Cir. 1988) ("*Lowary I*"), was properly rejected by the panel below, *see* Pet. App. 19a. Petitioners' contention that there is a conflict between the Sixth Circuit's decision and decisions of district courts *within the Sixth Circuit*, *see* Petition at 11-12, citing *Gillespie v. Willard City Board of Education*, 700 F. Supp. 898 (N.D. Ohio 1987) and *Jordan v. City of Bucyrus*, 739 F. Supp. 1124 (N.D. Ohio 1990), is equally unavailing. *Gillespie* and *Jordan* (like *Lowary* I) involved situations where, at the time of decision, the union still had not established an acceptable procedure to determine the amount of the fair share fees properly owing. The same is true of *Toledo Federation of Teachers v. Gibney*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1989), cited in the Petition at 11. As the Sixth Circuit put it in this case, none of the cited decisions sanctions what petitioners seek here—"a free ride after appropriate procedures for determining the proper fee amount were established." Pet. App. 19a.[7]

The reality is that every other court that has addressed this question has reached the same result as the court below. *See Gilpin v. AFSCME*, 875 F.2d 1310, 1313-16 (7th Cir. 1989) (Posner, J.) (full refund would be "a severely punitive remedy . . ., not one properly described as restitution at all," because "[t]he plaintiffs do not purpose to give back the benefits that the union's efforts bestowed on them"), *cert. denied sub nom. National Right to Work Legal Defense and Education Foundation, Inc. v. AFSCME*, 110 S.Ct. 278 (1989), *cert. denied sub nom.*

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[7] The only other decision cited by petitioners, *Elvin v. Oregon Public Employees Union*, 102 Or. App. 159, 793 P.2d 338 (1990), *see* Petition at 11, was decided exclusively under state law.

Estate of Gilpin v. AFSCME, 110 S.Ct. 278 (1989); *Hohe v. Casey*, 868 F.2d 69, 73-74 (3d Cir.), *cert. denied*, 110 S.Ct. 144 (1989); *Hohe v. Casey*, 727 F. Supp. 163, 167-68 (M.D. Pa. 1989); *Lehnert v. Ferris Faculty Association*, 643 F. Supp. 1306, 1334-35 (W.D. Mich. 1986); *McGlumphy v. Fraternal Order of Police*, 633 F. Supp. 1074, 1084 (N.D. Ohio 1986).

Because the Sixth Circuit's rejection of petitioners' demand for a full refund of their fair share fees is fully consistent with this Court's decisions and with all relevant lower court precedent, the ruling does not warrant further review.

II. PETITIONERS' CONTENTION THAT THE COURTS BELOW "ABDICATED THEIR JUDICIAL DUTIES" BY ACCEPTING THE IMPARTIAL ARBITRATOR'S DETERMINATION OF THE CHARGEABLE PROPORTION OF THE FAIR SHARE FEES IS WITHOUT MERIT, AND DOES NOT PRESENT A QUESTION THAT IS SIGNIFICANT OR LIKELY TO RECUR

Petitioners contend that "even if complete restitution is not required," the District Court and the Court of Appeals "abdicated their judicial duties" in holding that the amount of the fair share fees that LTA would be required to refund was the amount that the arbitrator determined to be nonchargeable under the LTA collection procedure. *See* Petition at 13-17. The simple—and dispositive—reason why the reference to the arbitrator's determination by the courts below did not constitute an "abdicat[ion]" is that the amount of the fair share fee to be charged to objecting employees was not an issue that was properly before those courts in this case. As the Sixth Circuit pointed out, "plaintiffs do not claim that the decisionmaker's determinations were improper. Rather plaintiffs only object to the use of the procedure." Pet. App. 21a. Petitioners were equally explicit in their brief to the Sixth Circuit, when they stated that their

claims concerned only "procedures" and had "nothing in the world to do with the separate issue of whether or not [petitioners] objected to particular union expenditures." Brief for Appellants at 9.[8]

It is thus clear that the District Court was not required to make a determination itself of the chargeable amount of the fee.

To be sure, if the process LTA used for this purpose was constitutionally impermissible or otherwise likely to result in a miscomputation, petitioners might have had some cause to complain. But that is not what happened. The process that was used by LTA to determine the amount of the fair share fees that could be charged to objectors for each of the years in question (*i.e.*, an arbitrator selected by the AAA) was found by the District Court to be constitutionally adequate, Pet. App. 70a, and petitioners did not appeal that finding. Furthermore, the procedural defects that the courts below did find in the LTA collection procedure were not of such a nature as to have affected the ultimate determination by the arbitra-

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[8] Although petitioners argue that they should not have been required to "'claim that [the arbitrator's determinations] were improper' on the merits," *see* Petition at 16, quoting Pet. App. 21a, petitioners suggest in footnotes that they did in fact make such a claim. *See* Petition at 16-17, nn.8 and 9. We submit that the courts below correctly construed the complaint and the relevant pleadings in concluding that no such claim had been made. But in all events, petitioners' belief that the courts below misunderstood what they were alleging is not a matter that warrants this Court's attention on *certiorari*.

It also bears mention that, contrary to petitioners' assertion, the Sixth Circuit's observation that petitioners had not "*claimed* that the [arbitrator's] determinations were improper" (emphasis added) did not place any burden of *proof* on petitioners. *See* Petition at 16.

Questions as to whether certain types of union expenditures are chargeable to objecting feepayers will be before the Court this Term in *Lehnert v. The Ferris Faculty Association, MEA-NEA*, No. 89-1217. The Petition in this case does not present any such question, and the questions presented here do not have any relationship to the questions presented in *Lehnert*.

tor. In short, the aspects of LTA's collection procedure that did *not* comport with *Hudson* had no impact on the process for arbitral determination of the amount of the fees, which *did* comport with *Hudson*.[6]

It also is important to make clear the limited purpose for which the court below made reference to the arbitral process. As the Sixth Circuit noted, any objector who believed that he or she was required by the arbitrator's de-

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[9] Although it might at first glance appear that the inclusion in LTA's 1987-88 collection procedure of the "local union presumption", which the Sixth Circuit found unconstitutional, could affect the arbitrator's computation, this is not in fact the case.

The "local union presumption" operated as follows: in notifying feepayers of the proportion of the fee that LTA had determined was chargeable, LTA did not undertake an audit and analysis of its own expenditures, but assumed that LTA spent the same proportion of its budget on chargeable matters as did its state parent organization, OEA; and detailed information as to *OEA's* finances was provided to all feepayers. *See* Affidavit of Jon A. Ziegler dated December 18, 1987, and exhibits thereto. As the procedure stated, LTA believed that the use of this "local union presumption" would understate the proportion of the fee that was properly chargeable by LTA, because, in reality, "the local and district associations spend a significantly larger percentage of their budget on chargeable expenditures [than does OEA]". *See* Exhibit A to Ziegler Affidavit.

In approving the use of the "local union presumption" for this purpose, the District Court specifically stated that the presumption would not be binding on the arbitrator who would ultimately determine the chargeable amount of the fee. Pet. App. 109a. LTA removed any possible doubt on that score by expressly declaring that it "d[id] not take the position that the procedure requires the arbitrator to accept the local union presumption at all—as a conclusive presumption or even as a rebuttable presumption." Brief of Appellees at 17 n.19. (Thus, the provision quoted in the Petition at 5, stating that the arbitrator will be required to apply the presumption, was not in fact implemented.) Although the Sixth Circuit held that the use of the presumption even for the notice phase of the LTA collection procedure fell short of the "full disclosure of financial information" that the court held was required, Pet. App. 17a, this defect had no impact on the arbitrator's subsequent determination of the amount of the fee.

termination to pay for activities that are not constitutionally chargeable could file a "subsequent § 1983 action" challenging the amount of the fair share fee. Pet. App. 20a, quoting *Hudson*, 475 U.S. at 308, n.21. In such an action, the court would be required to make its own determination as to chargeability, and "[t]he arbitrator's decision would not receive preclusive effect" in that determination. *Id.* This was simply not such an action.

Finally, even if the Sixth Circuit's "reliance" on the arbitrator's determination were not clearly appropriate, petitioners do not present an issue that is significant or likely to recur. Petitioners virtually admit the uniqueness of the issue when they assert that both courts below were guilty of a "judicial abdication," Pet. at 17, "which departs so far from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision," *id.* at 13. That indictment is unfounded, as we have shown, and does not warrant a grant of *certiorari.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 90-259 (3)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

WILLIAM LOWARY, *et al.*,
Petitioners,

v.

LEXINGTON TEACHERS ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES CONSTITUTION AND STATUTES

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I.

The decision below presents a direct conflict with several lower court decisions, and Respondents are particularly disingenuous in denying this fact. Cases conflicting with the decision below include *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6th Cir. 1988), *Gillespie v. Willard City Board of Education*, 700 F. Supp. 898 (N.D. Ohio 1987), *Jordan v. City of Bucyrus*, 739 F. Supp. 1124 (N.D. Ohio 1990) and *Toledo Federation of Teachers v. Gibney*, 40 Ohio St. 3d 152, 532 N.E.2d 1300 (1989).

While conceding that complete restitution was awarded to the injured agency fee payors in all of the cases cited above, Respondents contend that these decisions are distinguishable because they "involved situations where, at the time of the decision, the union still had not established an acceptable procedure to determine the amount of the fair share fees properly owing." Respondents' ("Resp.") Brief at 10. While Respondents' characterization of those cases is correct, it ignores the fact that the same can be said of the instant case. Here, Respondents have *never* had a valid *Hudson* plan in place, *and they still do not*. The decision below struck down a major portion of Respondents' collection plan (the "local union presumption" provisions), and the district court has yet to approve a replacement plan which omits the "presumption" and provides fee payors with adequate financial disclosure.[1]

In short, Respondents' assertion that the cases providing complete restitution are not in conflict with those that refused this remedy is incredible.

II.

Respondents contend that *Chicago Teachers Union, Local 1 v. Hudson*, 475 U.S. 292, 302 (1986) mandates the denial of a complete restitution remedy because it held that the objective of a valid pre-collection plan is "'to devise a way of preventing compulsory subsidization of ideological activity by employees who

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[1] Respondents' use of the "local union presumption" was found to violate *Hudson* because it permitted them to disseminate *no* audited financial information about the local and district affiliates, and thus keep agency fee payors "in the dark" about whether to object or not to the unions' fee calculations. *See Lowary v. Lexington Local Bd. of Educ.*, 903 F.2d 422, 431 (6th Cir. 1990), citing *Hudson*, 475 U.S. at 306. Contrary to the assertions in Respondents' Brief at 13 n.9, the unions' use of the "local union presumption" clearly had an effect on the final amount that fee payors had to pay, because the lack of disclosure obviously dissuaded many nonunion employees from making any objection at all. Those employees who were dissuaded from objecting were charged 100% of dues by Respondents.

object thereto,' ... ' *without restricting the Union's ability to require every employee to contribute to the cost of collective-bargaining activities.*' " Resp. Brief at 9, emphasis added by Respondents. This reading of *Hudson* is wide of the mark because the Court, 475 U.S. at 302, was referring to the purposes and goals to be considered when *future* plans were established. The Court, *id.*, was not discussing the remedy to be provided for *past* constitutional violations.

More instructive on the issue of complete restitution for past constitutional violations is *Hudson*, 475 U.S. at 309 n.22, where the Court stated that the "judicial remedy for a proven violation of law will often include commands that the law does not impose upon the community at large." Here, where three successive agency fee collection plans were struck down, there was not just "a proven violation," but three separate series of violations spanning three years. Thus, effective relief was certainly required. *See, e.g., United States v. Paradise*, 480 U.S. 149, ___, 107 S. Ct. 1053, 1078 (1987) (Stevens, J., concurring).

III.

Respondents assert that because this case is a challenge to the unions' "procedures," the lower courts were correct in deferring to the "arbitrator" on the "substantive" issues of the standards of chargeability and the amount of nonchargeable expenditures. This argument ignores the fact that as part of their "procedural" challenge to the agency fee seizures, Petitioners specifically challenged the standards of chargeability used by the unions; unfortunately, the district court refused to hear these challenges and blindly accepted the "arbitrator's" decision.[2] Yet,

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[2] Even when confronted with an argument that the arbitrator's decision was wrong as a matter of law, *see* Plaintiffs' Motion for Partial Reconsideration (District Court Docket No. 174, filed Oct. 23, 1987), the court refused to review that decision *under any circumstances*.

[note continued]

even Respondents recognize that these issues are properly within the jurisdiction of an Article III court. Resp. Brief at 13-14. Respondents' argument also ignores the fact that the unions' procedure is still invalid precisely because it uses erroneous definitions of chargeability (which invariably results in an erroneous chargeability determination). *Cf. Lehnert v. Ferris Faculty Ass'n*, 881 F.2d 1388 (6th Cir. 1989) (Merritt, J., dissenting), *cert. granted*, ___ U.S. ___, 110 S. Ct. 2616 (June 11,1990) (No. 89-1217).

In this respect, this case is closely analogous to *Lehnert v. Ferris Faculty Association*, Case No. 89-1217, in that these Petitioners, like those in *Lehnert*, challenged the chargeability standards used by the union. The problem here is that unlike *Lehnert*, the district court and court of appeals refused to decide these substantive issues, instead deferring to the ruling of a non-judicial "arbitrator" chosen pursuant to the terms of an unconstitutional agency fee collection plan. This was completely inappropriate under Article III of the United States Constitution and 42 U.S.C. § 1983. *See Felder v. Casey*, 487 U.S. 131, ___, 108 S. Ct. 2302, 2312 (1988).

In short, the lower courts were wrong in holding that challenges to the standards of chargeability, and to the ultimate

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> The Court's role in evaluating the present plan submitted by the [unions] was to determine whether it meets the constitutionally minimum standards of the first and fourteenth amendments and *not to resolve a claim that the chargeability decision is a correct one under the law. The Court has extinguished its duty to assure that a constitutionally minimum adequate plan is in place and finds that it is unnecessary to determine whether the impartial decisionmaker for the years 1985-86 and 1986-87 employed a proper standard.* Accordingly, the Court denies the plaintiffs' motion for reconsideration to the extent that it seeks to have the Court reconsider its decision on the standard of chargeability as outlined in the new plan.

Order Denying Plaintiffs' Motion for Partial Reconsideration (District Court Docket No. 176, filed Mar. 21, 1988) (emphasis added).

chargeability amount, could not be litigated in this 42 U.S.C. § 1983 case. The damages due in this civil rights lawsuit, which specifically challenged, *inter alia*, the standards and definitions of chargeability used by the unions, should have been determined solely by the district court, without abdication to an "arbitrator."

IV.

Finally, Respondents fail to discuss this Court's decision in *McKesson Corp. v. Florida Alcohol & Tobacco Division*, ___U.S.___, 110 S. Ct. 2238 (1990), even though the analysis in that case bears directly on the instant Petition. In *McKesson*, this Court held that where unconstitutional tax seizures occur, "the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward looking relief to rectify any unconstitutional deprivation." *Id.*, ___ U.S. at ___, 110 S. Ct. at 2247. *See* Petition at 9-10. The relief provided herein was not meaningful specifically because it failed to restore to Petitioners property that should never have been seized in the first place. *See Hudson*, 475 U.S. at 309 (disallowing all collections made in the absence of a valid procedure because "the agency shop itself impinges upon the nonunion employees' First Amendment interests"); *Tierney v. City of Toledo*, 824 F.2d 1497, 1504, 1507 (6th Cir. 1987) (unions must "establish and maintain" a valid plan as a condition precedent to *any* agency fee seizures); *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131, 134-35 (6th Cir. 1988) (same).

Respondents also fail to note that this Court has granted a writ of certiorari in another case raising the restitution issues discussed in *McKesson*. *See James B. Beam Distilling Co. v. Georgia*, ___ U.S. ___, 111 S. Ct. 31 (June 11, 1990) (No. 89-680). Thus, the instant case poses obviously timely, important and recurring issues which should be heard by this Court.

CONCLUSION

For the reasons set forth herein, William Lowary and Sara Wyatt pray that this Court grant their Petition.

Respectfully submitted,

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